DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1168
Title: Eleanor McCullen, et al., Petitioners
v.
Martha Coakley, Attorney General of Massachusetts, et al.
Docketed: March 26, 2013
Linked with 13A543
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (12-1334)
Decision Date: January 9, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 25 2013	Petition for a writ of certiorari filed. (Response due April 25, 2013)
Apr 24 2013	Order extending time to file response to petition to and including May 24, 2013.
Apr 24 2013	Brief amici curiae of Richard W. Garnett, et al. filed.
Apr 24 2013	Brief amici curiae of Life Legal Defense Foundation, and Walter B. Hoye II filed.
Apr 24 2013	Brief amici curiae of Molly White, et al. filed.
May 24 2013	Brief of respondents Martha Coakley, Attorney General of Massachusetts, et al. in opposition filed.
Jun 4 2013	Reply of petitioners Eleanor McCullen, et al. filed.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Petition GRANTED.
Jul 10 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 9, 2013.
Jul 10 2013	The time to file respondents' brief on the merits is extended to and including November 7, 2013.
Sep 9 2013	Joint appendix filed. (Statement of costs filed.)
Sep 9 2013	Brief of petitioners Eleanor McCullen, et al. filed.
Sep 13 2013	Brief amicus curiae of American Center for Law and Justice filed.
Sep 13 2013	Brief amici curiae of Democrats for Life of America and Clergy for Better Choices filed.
Sep 13 2013	Brief amicus curiae of Justice and Freedom Fund filed.
Sep 13 2013	Brief amicus curiae of 12 Women Who Attest to the Importance of Free Speech in Their Abortion Decisions filed.
Sep 13 2013	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Sep 16 2013	Brief amici curiae of Life Legal Defense Foundation and Walter B. Hoye II filed.
Sep 16 2013	Brief amicus curiae of Liberty Counsel filed.

Sep 16 2013	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Sep 16 2013	Brief amicus curiae of Cato Institute filed.
Sep 16 2013	Brief amici curiae of Michigan and 11 Other States filed.
Sep 16 2013	Brief amicus curiae of Institute for Justice in support of neither party filed.
Sep 16 2013	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Sep 16 2013	Brief amici curiae of Eugene Volokh, et al., filed.
Sep 16 2013	Brief amici curiae of National Hispanic Christian Leadership Conference, et al. filed.
Sep 16 2013	Brief amici curiae of Bioethics Defense Fund, et al., filed.
Sep 16 2013	Brief amici curiae of American Civil Liberties Union, et al. filed.
Sep 16 2013	Brief amicus curiae of 40 Days for Life filed.
Sep 16 2013	Brief amicus curiae of The Rutherford Institute filed.
Nov 4 2013	SET FOR ARGUMENT ON Wednesday, January 15, 2014.
Nov 5 2013	The time to file respondents' brief on the merits is further extended to and including November 15, 2013.
Nov 5 2013	CIRCULATED
Nov 15 2013	Brief of respondents Martha Coakley, Attorney General of Massachusetts, et al. filed. (Distributed)
Nov 21 2013	Record from the U.S.C.A. 1st Circuit is electronic and located on PACER. Also record received from the U.S.C.A. 1st Circuit. (1 Box)
Nov 21 2013	Brief amici curiae of Planned Parenthood League of Massachusetts and Planned Parenthood Federation of America filed. (Distributed)
Nov 21 2013	Brief amici curiae of National Abortion Federation & 31 Other Organizations filed. (Distributed)
Nov 22 2013	Brief amicus curiae of United States filed. (Distributed)
Nov 22 2013	Brief amici curiae of City and County of San Francisco, California, and Seventeen Other Municipalities filed. (Distributed)
Nov 22 2013	Brief amici curiae of Victim Rights Law Center, et al. filed. (Distributed)
Nov 22 2013	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. (Distributed)
Nov 22 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 22 2013	Brief amici curiae of New York, et al. filed.
Nov 22 2013	Brief amici curiae of Anti-Defamation League, et al. filed. (Distributed)
Nov 22 2013	Brief amici curiae of Civil Rights Organizations filed. (Distributed)
Nov 22 2013	Brief amici curiae of National League of Cities, et al. filed.
Nov 22 2013	Brief amici curiae of Law Professors filed. (Distributed)
Nov 27 2013	Application (13A543) to extend the time to file a reply brief on the merits from December 16, 2013 to December 20, 2013, submitted to Justice Breyer.
Nov 27 2013	Application (13A543) granted by Justice Breyer extending the time to file until December 20, 2013.
Dec 9 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 20 2013	Reply of petitioners Eleanor McCullen, et al. filed. (Distributed)

Jan 15 2014	Argued. For petitioners: Mark L. Rienzi, Washington, D. C. For respondents: Jennifer Grace Miller, Assistant Attorney General, Boston, Mass.; and Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Jan 16 2014	Letter from counsel for the petitioners filed. Distributed

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12-1168
No. 12-

Supreme Court, U.S.
FILED
MAR 25 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents ... acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill* v. *Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

PARTIES TO THE PROCEEDING

All petitioners are listed in the caption. Noreen Beebe, Carmel Farrell, and Donald Golden were at one time plaintiffs in the district court but were not parties to the most recent proceeding on appeal.

In addition to respondent Coakley, the appellees below were Daniel F. Conley, in his official capacity as District Attorney for Suffolk County; Joseph D. Early, in his official capacity as District Attorney for Worcester County; and Mark G. Mastroianni, in his official capacity as District Attorney for Hampden County. Michael W. Morrissey, in his official capacity as District Attorney for Norfolk County, was at one point a defendant in the district court but was not a party to the most recent proceeding on appeal.

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
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ATTORNEY GENERAL FOR THE
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Eleanor McCullen et al. respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) affirming final judgment against petitioners is not yet officially reported, but may be found at 2013 WL 85928. The opinion of the district court rejecting petitioners' as-applied challenge and entering final judgment (App. 29a-66a) is reported at 844 F. Supp. 2d 206. An interim order of the district court (App. 67a-91a) is reported at 759 F. Supp. 2d 133. The court of appeals' earlier opin-

ion rejecting petitioners' facial challenge and affirming the denial of preliminary relief (App. 93a-120a) is reported at 571 F.3d 167. The opinion of the district court on those issues (App. 121a-210a) is reported at 573 F. Supp. 2d 382.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in full at App. 219a-221a. The most relevant portion of chapter 266, Section 120E½ of the Massachusetts General Laws provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

* * *

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

Since 2007, Massachusetts has enforced selective speaker exclusion zones on the public streets and sidewalks outside abortion clinics. Speakers who are not clinic employees or agents may not set foot within marked zones extending for 35 feet in each direction from each clinic entrance, exit, or driveway, even if they are entirely peaceful and seek only to proffer leaflets or engage in wholly consensual conversations. Meanwhile, clinic employees or agents are categorically exempt from any restriction and thus free to enter, remain, and speak within the zones.

Relying largely on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the First Circuit held that these abortion-specific, speaker-specific exclusion zones are constitutionally permissible, both facially and as applied to petitioners. In particular, the court held that the zones are content-neutral, narrowly tailored, and not overbroad, and that they leave open adequate alternative channels for petitioners' speech. The holding of content-neutrality conflicts with the Ninth Circuit's decision in *Hoye* v. *City of Oakland*, 653 F.3d 835 (2011), which struck down a discriminatory enforcement policy indistinguishable from what the Massachusetts statute provides for on its face. The First Circuit's reasoning also departs from established First Amendment principles and ranges far beyond the outer limits marked by *Hill*.

1. The 2007 statute at issue here replaced a law originally adopted in 2000 restricting certain speech-related conduct outside abortion clinics. The 2000 statute prohibited speakers from approaching closer than six feet from a potential listener without consent. The law applied to only close, physical approaches to unwilling listeners, was ostensibly designed to address "violence and aggressive behavior" outside clinics, and was partially modeled on the statute upheld in *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36, 39-40 (1st Cir. 2001) (*McGuire I*).

The Colorado statute in *Hill* established zones around all health care facilities in which speakers were prohibited from "'knowingly approach[ing] another person within eight feet of such person, unless such person consents.'" *Hill*, 530 U.S. at 707 n.1. In sustaining the statute, the Court relied heavily on the fact that it barred not entry or speech but only close physical approaches to unwilling listeners. In particular, the

Court noted that (i) an 8-foot radius still allowed a speaker to communicate from a "normal conversational distance," and (ii) prohibiting physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 726-727. Observing that the statute applied equally at all health care facilities (not just abortion clinics) and to all speakers (not just abortion opponents), the Court found it content- and viewpoint neutral. *Id.* at 725. The Court repeatedly emphasized "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication," and that the Colorado law "deal[t] only with the latter." *See, e.g., id.* at 715-716.

The First Circuit relied largely on *Hill* in upholding Massachusetts' 2000 no-approach law against a First Amendment challenge. *See McGuire I, supra*; *McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*). In those cases, challengers pointed out that pre-existing laws already prohibited objectionable conduct outside abortion clinics. For example, federal law prohibits "obstruct[ing], intentionally injur[ing], intimidat[ing] or interfer[ing]" with access to reproductive health services. 18 U.S.C. § 248. State law separately prohibits interfering with any person's exercise of a constitutional right, G.L. c. 265, § 37, or obstructing access to any medical facility, G.L. c. 266, § 120E (2000). The First Circuit nonetheless sustained the 2000 no-approach law as a prophylactic measure, reasoning that the State could conclude existing laws "cast wider nets" that might catch "big fish" but "let the fingerlings through." *McGuire I*, 260 F.3d at 49.

In response to a petition for certiorari, the State argued, among other things, that the 2000 law "restrict[ed] only conduct" and that "whether a narrowly tailored floating buffer zone statute—restricting no speech but only non-consensual 'approaches'—violates the First Amendment" had been resolved in *Hill*. 04-939 Br. in Opp. 13-14. The State also argued that there was no evidence the case's "unique facts" were "replicated in other settings across the country." *Id.* at 13. This Court denied review. 544 U.S. 974 (2005).

2. By 2007, Massachusetts had not proven a single violation of the 2000 no-approach law. There was also no evidence of a single prosecution during that period under any state, federal or local law directly targeting violence, obstruction, intimidation, trespass, or harassment at abortion clinics in Massachusetts. Nonetheless, the legislature heard testimony from abortion advocates and law enforcement officers that confrontational protests occurred at abortion clinics, that enforcement of the no-approach zone was difficult, and that a 35-foot zone "where no protesters can go ... would be great ... [and] would make our job so much easier." App. 148a. It decided to amend the law over the objection of, among others, the American Civil Liberties Union of Massachusetts, which opposed the changes "mainly on overbreadth grounds." App. 149a.

The 2007 legislation changed the no-unconsented-approach zone into a no-entry zone—at least, for some speakers. As amended, the Act (reprinted at App. 219a-221a) establishes zones on the public streets and sidewalks extending 35 feet in all directions from each "entrance, exit or driveway of a reproductive health care facility." § 120E½(b). The Act makes it illegal to "enter or remain" in these portions of public streets and

sidewalks, providing for prison terms of up to 30 months and criminal fines of up to $5,000. § 120E½(d).

Unlike the Colorado law sustained by this Court in *Hill*, the Act does not apply to all health care facilities. It applies only to non-hospital locations "where abortions are offered or performed." § 120E½(a). Also unlike the law in *Hill*, the Act does not apply to all speakers. In addition to passers-by and "municipal agents" (such as police and firefighters), the Act specifically exempts from its prohibitions all "persons entering or leaving" an abortion clinic and, separately, all "employees or agents of [a clinic] acting within the scope of their employment." § 120E½(b)(1)-(2).

Finally, unlike the law in *Hill*, which prohibited only close, unwanted approaches to unwilling listeners, the Act prohibits non-exempt speakers from entering the zones to offer leaflets, display signs, or speak or offer to speak with others at normal conversational distances. Non-exempt speakers may not position themselves in non-obstructive ways and then simply remain stationary on public streets or sidewalks inside the zone. *Compare Hill*, 530 U.S. at 726-727. In the State's exclusion zone, even peaceful conversation with willing listeners is outlawed. § 120E½(b).

3. Petitioners are individuals who regularly station themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. In January 2008, petitioners sued to enjoin enforcement of the Act under the First and Fourteenth Amendments. The district court had jurisdiction under 28 U.S.C. § 1331.

Less than two weeks later, respondent sent a letter to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the

Act. App. 4a, 119a-120a. Respondent's "guidance" indicated that, despite the Act's facially absolute exemption, clinic employees and agents were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." App. 119a. Similarly, respondent instructed that persons crossing through the zone as mere passers-by were criminally prohibited from "expressing their views about abortion or engaging in other partisan speech." App. 119a-120a.

The district court bifurcated the proceeding, first addressing petitioners' facial challenge and request for preliminary relief. The court held a bench trial on a stipulated record, and in August 2008 upheld the Act as a content-neutral time, place, and manner regulation. App. 121a-210a.

4. a. The court of appeals affirmed. App. 93a-120a (*McCullen I*). To begin with, it reasoned that objections to the Act's exclusive focus on abortion clinics (as opposed to all health care facilities) had been addressed and rejected in its *McGuire* decisions. App. 105a (citing *McGuire I*, 260 F.3d at 44-47, and *McGuire II*, 386 F.3d at 56-59). Although it recognized that Massachusetts "was plainly moved to enact the statute by the secondary effects of anti-abortion protests," App. 113a, the court concluded that any disparate impact on abortion-related speech did not result from "a content-based preference." App. 105a.

The court likewise held that *McGuire I* had already "squarely repulsed" the argument that the Act's exemption for clinic employees and agents made it not viewpoint-neutral. App. 105a (citing 260 F.3d at 45-47). In *McGuire I*, the court held that the previous Act's prohibition on close, unconsented approaches was fa-

cially neutral despite the employee exemption because the law as a whole had public-safety goals (260 F.3d at 44); the exemption for clinic employees was "neutral on its face, drawing no distinction between different ideologies" (*id.* at 48; *see also id.* at 45-46); and the court could "envision at least one legitimate reason for including the employee exemption," which was "to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution" (*id.* at 47). Thus, because "the legislature rationally could have concluded that clinic employees are less likely to engage in directing unwanted speech toward captive listeners," the court upheld the law as neutral. *Id.* at 46.

The court adhered to these views in the context of the new speaker-exclusion zones. The "decisive question in a facial challenge," in the court's view, was only "whether a court can glean legitimate reasons" for a particular regulation. App. 106a. Here, the court concluded, the exemption for clinic agents and employees was "reasonably related to the legislature's legitimate public-safety objectives," *id.*, and therefore raised no concern about content- or viewpoint-neutrality.

Having deemed the Act content-neutral, the court further concluded that, on its face, the Act was narrowly tailored, not overbroad, and left open ample alternative channels of communication. App. 108a-112a. Dismissing petitioners' objection that the Act outlaws peaceful leafletting on public sidewalks and restricts petitioners from speaking to willing listeners at the "conversational distance" discussed in *Hill*, the court reasoned that "the Constitution neither recognizes nor gives special protection to any particular conversational distance" and that "handbilling is not specially protected." App. 110a. It relied on *Hill* for the proposition

that time, place, and manner restrictions "routinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels, the court expressed the view that "as long as [the court could] envision circumstances in which a 35-foot buffer zone allow[ed] adequate alternative means of expression, [a facial] challenge must fail." App. 111a. Under that standard the court saw ample alternative channels because petitioners could go outside the exclusion zones if they wished to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and "[a]ny willing listener [was] at liberty to leave the zone [and] approach those outside it." *Id.*

In concluding its opinion, the court noted "the very heavy burden that plaintiffs must carry in mounting a facial challenge to a state statute." App. 118a. It indicated that nothing in its opinion "foreclose[d] the possibility that, on a better-developed record, this legislative solution may prove problematic in particular applications." *Id.*

b. In November 2009, petitioners asked this Court to review the First Circuit's rejection of their facial challenge. *McCullen* v. *Coakley*, No. 09-592. In opposing review, the State argued, among other things, that the decision was interlocutory; the parties had "not yet been able to conduct discovery, present a full case, or cross-examine" witnesses; and it "would not be appropriate for the Court to review these questions without the benefit of fact finding based on a full evidentiary record." 09-592 Br. in Opp. 35. In response to petitioners' argument that the *McGuire* and *McCullen*

decisions had already been invoked by the district court in *Hoye* v. *City of Oakland*, 642 F. Supp. 2d 1029 (N.D. Cal. 2009), the State argued that "there [was] no reason to assume the Ninth Circuit, faced with facts similar to those here, would reach a result different from the First Circuit's decision below." 09-592 Br. in Opp. 30. This Court denied review. 130 S. Ct. 1881 (2010).

5. On remand, the district court declined to revisit petitioners' facial claims in light of intervening decisions of this Court. App. 70a-80a. It further held that the First Circuit's decision sustaining the Act on its face also foreclosed almost all of petitioners' as-applied claims. App. 81a-88a. The court permitted petitioners to advance only a claim that the Act, as applied, did not leave petitioners with adequate alternative means of communication. App. 88a. As to that issue, the court permitted discovery and then held a bench trial based on written testimony and factual submissions from the parties.

Petitioners testified that they seek to engage women who may be seeking abortions in close, kind, personal communication, with a calm voice, caring demeanor, and eye contact.[1] They explained that this kind of communication is essential to their ability to effectively convey their message of love and support. And they testified, without rebuttal, that application of the Act to their activities at specific locations in Boston, Worcester, and Springfield virtually destroys their ability to communicate this message effectively to the special audience they need to reach—pregnant women on the

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[1] This recitation of the evidence is taken largely from petitioners' opening brief in the court of appeals, which provides detailed citations to record materials included in the appendix filed in that court.

verge of a potentially unnecessary abortion who might welcome and benefit from an offer of alternative help.

Undisputed evidence showed that women often have abortions because of financial or other pressures, including pressure from husbands or boyfriends. Indeed, most women that petitioner McCullen succeeds in speaking with tell her they do not want an abortion but feel they have no real alternative. Academic studies confirm that women often seek abortions because they feel they cannot afford a baby, are having relationship problems, or are being pressured to have an abortion. *See, e.g.*, Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 113 (2005) (reasons given for abortion: "Can't afford a baby now" [73%]; "Not sure about relationship" [19%]; "Husband or partner wants me to have an abortion" [14%]).[2]

Petitioners thus have a firm basis for believing that a woman seeking an abortion may welcome speech that can offer both moral support and more concrete assistance. Petitioners who seek to offer such assistance testified, however, that in order to be effective, their messages must be conveyed in a friendly, gentle manner, with eye contact, from a conversational distance. In particular, shouting from a distance is ineffective or counter-productive. Likewise, most people will not make the effort to accept proffered literature unless it can be placed near their hands.

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[2] *See* http://www.guttmacher.org/pubs/journals/3711005.pdf. This Court has observed that providing information about abortion and its alternatives "ensure[s] an informed choice" and helps "reduce[] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 882-883 (1992).

For example, petitioner McCullen is a 74-year-old grandmother who offers help outside of a Boston Planned Parenthood clinic on Tuesdays and Wednesdays. Over the 5 years before her testimony, McCullen and her husband spent over $50,000 of their own money to pay for baby showers, living quarters, furniture, household items, heating oil, electricity, water, telephone, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else was needed by women who wanted help to effectuate their choice to avoid abortion. In McCullen's experience, it is, as a practical matter, impossible to make women aware that such help is available without close personal contact and an opportunity for confidential discussion.

Similarly, one of the State's witnesses testified that, in her investigations at Planned Parenthood, she observed only one person respond to attempts at communication: a young woman with whom the pro-life counselors spoke at close range and with eye contact. When the only available communication was a pro-life sign or shout, people just "walked on by."

The evidence confirmed that the Act, by keeping petitioners at least 35 feet from all entry points, prevents petitioners from engaging in effective communication by identifying women headed there and extending non-confrontational offers to speak with them. It also forces any conversation that may be initiated to stop at the boundary line of the buffer zone. In Boston, for example, the exclusion zone includes all but one foot of the public sidewalk and on one side extends four feet into the street, making it impossible for petitioners even to stand at the edge of the zone. (Pictures of the Boston, Worcester, and Springfield exclusion zones from the trial record are reproduced at App. 211a-218a.) Meanwhile, clinic employees or agents are free

to remain in the zone and to approach and speak with anyone within it.

Petitioner McCullen testified that she attempts to speak with women outside the zone, but that the Act frequently makes such discussions impossible. For example, there are many times when McCullen sees a woman approaching the clinic from the opposite side of the zone, and cannot move around the zone herself quickly enough to try to begin a conversation or put literature near the woman's hands before she enters the zone.

Notably, when McCullen is able to reach her intended audience, her outreach is effective. She estimates, for example, that the information and offers of assistance she has managed to provide even under the 2007 Act's restrictions have helped some 80 women effectuate their own choice to pursue an alternative to abortion. The Act's exclusion zones have, however, drastically reduced her ability to communicate her message. She testified that the Act has prevented her from speaking at all with at least 5-6 people per day of outreach activity, or 480-586 people per year. At that rate, the Act has prevented McCullen from speaking with between 2,160 and 2,637 people. Even when she is able to make an initial contact, McCullen testified that the Act's restrictions change the nature of her conversations, making them shorter and less effective because she is forced to speak hurriedly, sometimes speak louder, and stop walking at the painted exclusion line.

For similar reasons, Plaintiff Zarrella—an 85-year-old grandmother who offers help on Saturdays and some Wednesdays—testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful inter-

action with an incoming woman since the Act took effect—after more than 100 successful interactions before the Act.

Petitioners also testified that clinic agents regularly use their statutory exemption to interfere with petitioners' attempts to communicate. For example, clinic speakers surround and walk with women approaching the clinic, sometimes yelling, making noise, chattering and/or talking loudly, saying things such as "you don't have to listen to her," or "don't pay any attention to her," or "don't listen to her," or "she is crazy." Clinic speakers also raise and lower their arms to prevent petitioners from placing literature near the hands of recipients. These actions of course make it more difficult for petitioners to communicate their message.

Petitioners presented similar evidence regarding clinics in Worcester and Springfield. In Worcester, for example, zones around the clinic property's pedestrian and driveway entrances both extend far into the street. Petitioners Clark and Bashour are forced to stand behind a fence 75-100 feet away from the clinic doorway, or 35 feet away from the driveway entrance. Unsurprisingly, virtually no one responds to offers of help shouted over such distances, and petitioners have almost no ability to offer leaflets to persons arriving by car. In Springfield, zone lines are painted around all five driveways into the private parking areas surrounding a clinic. Petitioner Shea testified that before the 2007 Act, he would stand a few feet from the driveways and offer literature to occupants of entering vehicles. Since the Act took effect, he has not succeeded in distributing literature to anyone arriving by car.

Despite this evidence, in February 2012, the district court ruled that the Act, as applied, leaves peti-

tioners with ample alternative means to communicate their message. App. 65a-66a.

6. The court of appeals affirmed. App. 1a-28a.[3]

First, the court rejected petitioners' request that it revisit its previous rulings that the 2007 Act is content- and viewpoint-neutral and constitutional on its face. App. 9a-14a. In the court of appeals' view, nothing in this Court's recent First Amendment cases involved any "retreat from [the Court's] well-settled abortion clinic/buffer zone jurisprudence." App. 12a (citing *Hill* and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

Next, the court sustained the district court's grant of judgment on the pleadings as to most of petitioners' as-applied claims. App. 14a-20a. In that regard, the court, among other points, reiterated its holding that the Act is "viewpoint-neutral" despite its exemption for clinic employees and agents. App. 15a. It asserted, without explanation, that the exemption—which simply states that the Act's prohibition on entry into exclusion zones "shall not apply" to "employees or agents of such facility acting within the scope of their employment," § 120E½(b)(2)—"does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." App. 15a; *see also* App. 17a (reasoning that if clinic agents use their presence in exclusion zones, specifically permitted by state law, "to advocate a particular point of view or to drown out the plaintiffs' message," they "are not state actors"

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[3] Although Judges Boudin, Selya, and Stahl heard oral argument, the court's opinion was issued by Judges Selya and Stahl "pursuant to 28 U.S.C. § 46(d)." App. 1a n.*. The court offered no explanation for Judge Boudin's withdrawal.

and "there is no allegation that such behavior has been sanctioned by the state").

Finally, the court affirmed the rejection of petitioners' as-applied challenge. App. 20a-26a. Again proceeding on the premises that the Act is content-neutral and narrowly tailored to serve an adequate state interest, the court viewed the "pivotal question" as "whether the Act, as applied, leaves open adequate alternative means of communication." App. 22a. The court acknowledged that the Act "curtails [petitioners'] ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," App. 23a, relegating them instead to "shorter, louder, and less personal exchanges," App. 22a. The court thought this difference insignificant, however, because petitioners retained the ability to engage, outside the exclusion zones, in "oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups," and these activities made it "readily apparent" that the Act leaves petitioners with "adequate communicative channels." App. 23a, 26a.

REASONS FOR GRANTING THE PETITION

This case presents an important First Amendment question: May the government permit individuals who seek to facilitate access to abortion to enter and speak in public areas near abortion clinics, while forbidding entry to individuals who seek to engage in peaceful, non-obstructive speech offering information about and help in pursuing other choices? The First Circuit upheld such a government preference for clinic speakers,

while the Ninth Circuit rejected it as "the epitome of a content-based restriction." *Hoye*, 653 F.3d at 851.

The First Circuit also erred in upholding a law that goes far beyond the outer limits on speech restriction marked out by this Court *Hill* v. *Colorado*, 530 U.S. 703. *Hill* relied on three critical safeguards: equal applicability to all healthcare facilities, equal applicability to all speakers, and narrow-tailored application only to close, unwanted physical approaches. All are absent here. Massachusetts' 2007 Act applies only at abortion clinics; permits speech by clinic agents while excluding speakers who advocate alternatives to abortion; and completely excludes disfavored speakers from otherwise public areas, banning even consensual speech with willing listeners. Moreover, in addressing petitioners' as-applied challenge the First Circuit, unlike this Court in *Hill*, gave no weight at all to petitioners' right to offer leaflets within a normal reach and to engage listeners from a normal conversational distance. No decision of this Court has ever permitted so absolute a prohibition of speech in the public forum.[4]

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[4] When the Court denied review in *McCullen I*, the First Circuit had rejected petitioners' facial challenge but remanded the case for as-applied proceedings. *See* App. 118a ("Nothing that we have said forecloses the possibility" of eventual relief "on a better-developed record."). The as-applied proceedings have now concluded—and the Ninth Circuit has decided *Hoye*. The matter is fully ripe for review. *Cf. Mt. Soledad Mem. Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of certiorari in light of interlocutory posture).

I. THE DECISION BELOW SUSTAINING MASSACHUSETTS' LAW AS CONTENT-NEUTRAL CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *HOYE*

A. The Massachusetts Act Creates Zones In Which Speech Facilitating Abortion Access Is Permitted While Speech About Alternatives Is Banned

1. Massachusetts' 2007 Act restricts speech on public streets and sidewalks by creating no-entry zones around entrances to abortion clinics. It then specifically permits entry into the zones by, among others, "employees or agents of [a clinic] acting within the scope of their employment." § 120E½(b)(2). Accordingly, while petitioners face prison if they use public sidewalks in the zone to engage in peaceful, non-confrontational speech about alternatives to abortion, clinic agents may enter and speak with impunity so long as they are there on clinic business. This exemption, with its scope-of-employment limitation, is inescapably viewpoint-based. The speech it permits within the exclusion zone will *necessarily* express the clinic's view.

Respondent has implicitly acknowledged this obvious problem with the Act. Less than two weeks after petitioners filed this case, she sent a letter to state law-enforcement personnel with "guidance" indicating that, despite the Act's facially absolute exemption, clinic employees and agents were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." App. 119a. The State's perceived need for this "guidance" is telling, but such "guidance" cannot change the plainly discriminatory terms of the Act, and the court

of appeals did not rely on it in holding the Act content-neutral. *See* App. 5a.[5]

Exactly how the First Circuit *did* reach that holding is, frankly, difficult to discern. In its most recent opinion, the court primarily referred back to previous decisions. *See, e.g.*, App. 5a, 9a, 13a, 15a. The only further analysis it offered was the proposition that the employee exemption "does not purport to allow ... advocacy by an exempt person," and a suggestion that there was "no allegation that such [advocacy] has been sanctioned by the state." App. 15a, 17a. This makes no sense. The State obviously "allow[s]" and "sanction[s]" particular speech when it permits specified speakers, "acting within the scope of their employment," free access to portions of public sidewalks that speakers with a different message are forbidden to enter. This differential treatment—shown starkly by the photograph at App. 211a—is a classic First Amendment violation. *See Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

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[5] Prosecutors have a practical ability to *narrow* the scope of a criminal statute through administrative construction and the exercise of prosecutorial discretion. They have no ability to *broaden* a statute so it can be applied to individuals exempted by the legislature. Any clinic employee prosecuted for speech in an exclusion zone would have an absolute defense on the face of the statute itself. Moreover, if the Attorney General's "guidance" could be given legal effect, its prohibition on otherwise-exempt persons entering the zone "to express their views about abortion or to engage in any other partisan speech," App. 119a, is expressly content-based, and thus would itself be presumptively unconstitutional. *See, e.g.*, *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533-34 (1980).

As to the earlier opinions on which the First Circuit relied, in *McGuire I* the court said the employee exemption is "neutral on its face" because it "draw[s] no distinction between different ideologies." 260 F.3d at 48; *see* App. 15a (citing *McCullen I*, 571 F.3d at 178 & n.2); App. 9a (cited portion of *McCullen I*, in turn relying on *McGuire I*). This statement apparently rested on the premise that, without a factual record, no one could predict whether speech by clinic agents or employees would favor or oppose abortion. *See* 260 F.3d at 45-46. That reasoning is unsound as a matter of common sense, but in any event, it ignores the statutory requirement that any in-zone speech by clinic agents be "within the scope of their employment." That requirement affirmatively dictates the viewpoint of the permitted speech.

Nor can the law plausibly be declared neutral based on the government's desire to make "crystal clear" that speakers who facilitate access need not fear prosecution, or its assumption that women will want to hear from clinic speakers but not from speakers offering alternatives. *See* App. 169a-172a. The First Circuit's acknowledgement of such government motivations confirms, rather than rebuts, the charge of content-discrimination.

The First Circuit's difficult-to-trace arguments do not refute petitioners' simple point that the exclusion zones Massachusetts has created outside abortion clinics are discriminatory on their face. The Act permits entry into and speech in those zones by clinic agents or employees who seek to facilitate access to abortion. It bans any entry into the same, otherwise public zones by petitioners or others who seek to offer peaceful, non-confrontational speech and assistance

concerning potential alternatives. That is not a neutral regulation of the time, place, or manner of speech.

2. Throughout the *McGuire* and *McCullen* cases, the First Circuit has insisted that its analysis of content neutrality flows from this Court's decision in *Hill* v. *Colorado*. *See, e.g.*, App. 105a (citing *McGuire I*, 260 F.3d at 44-47). On the contrary, however, the Massachusetts Act lacks the basic indicia of neutrality that this Court stressed in *Hill*.

First, the statute in *Hill* applied at all health care facilities. This Court emphasized that "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." 530 U.S. at 731. Indeed, the Court explained that it was "precisely because the Colorado Legislature made a general policy choice that the statute [was properly] assessed under the constitutional standard" for time, place and manner restrictions, rather than a stricter standard. *Id.* (emphasis added). Here, in sharp contrast, the Massachusetts Act applies only to locations "where abortions are offered or performed." Act § 120E1/2(a)-(b) (App. 219a).[6]

Second, *Hill* underscored that Colorado's no-approach law applied equally to all speakers:

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[6] At other medical facilities, Massachusetts expressly *protects* peaceful, nonobstructive speech. *See* Mass. G.L. c. 266, § 120E (forbidding obstructing access or impeding medical services, but safeguarding the "right[] to engage in peaceful picketing which does not obstruct entry or departure"). Thus, at general service facilities where speakers might address any number of issues (labor disputes, animal testing, etc.), the State properly focuses on objectionable conduct. Where speakers are likely to address only abortion, it criminalizes peaceful, non-obstructive speech.

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion .... It applies to all "protest," to all "counseling," and to all demonstrators[,] ... whether they oppose or support ... [the] abortion decision. *That is the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added); see also *id.* at 731. This discussion reflects the axiomatic point that the government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger* v. *Rector*, 515 U.S. 819, 829 (1995); *see also Mosley*, 408 U.S. at 96. Again, however, Massachusetts has departed from this basic precept, establishing exclusion zones that apply to speakers who counsel against abortion while exempting clinic agents acting in the course of their employment. Such a statute finds no support in *Hill*. Rather, as this Court has recognized, "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

B. The First Circuit's Decision Conflicts With *Hoye*

The First Circuit's decision sustaining the Massachusetts Act as content-neutral directly conflicts with the Ninth Circuit's decision in *Hoye*. There, Oakland enacted a no-approach zone similar to the one upheld by this Court in *Hill*. In response to an initial legal challenge, the city amended its ordinance so that, on its face, it did not discriminate among speakers. *Hoye*, 653 F.3d at 841-842. By policy, however, the city did not *enforce* the law against individuals who sought to *facilitate* access to abortion clinics. *Id.* at 849-851, 856. In other words, Oakland's enforcement policy was the same as Massachusetts' statutory exemption for clinic "employees or agents."

The Ninth Circuit sustained Oakland's statute on its face, but invalidated the city's policy of differential enforcement. In a decision written by Judge Berzon for herself, Judge Reinhardt, and the late Judge Pollak, the court squarely held that "[t]he City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral." 653 F.3d at 851. Indeed, the court recognized the policy as "the epitome of a content-based speech restriction." *Id.*

Looking to *Hill*, the Ninth Circuit recognized that this Court had accepted Colorado's close-unconsented-approach statute as content-neutral precisely because it applied to all speakers "whether they oppose or support the woman who has made an abortion decision." 653 F.3d at 851-852 (quoting *Hill* 530 U.S. at 725). Oakland's enforcement policy, in contrast, "d[id] not meet this level of neutrality," because "[t]o distinguish between speech facilitating access and speech that dis-

courages access is necessarily to distinguish on the basis of substantive content." *Id.* at 852. "Asking a woman 'May I help you into the clinic?' facilitates access; 'May I talk to you about alternatives to abortion?' discourages it." *Id.* An enforcement policy that permits one question but not the other is "indubitably content-based." *Id.*

The First Circuit's reasoning and holding in this case are directly contrary to the Ninth Circuit's reasoning and holding in *Hoye*. *Compare also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 274-275 (3d Cir. 2009) (holding exclusion-zone law content-neutral only after construing it to prohibit in-zone advocacy by exempted clinic agents). The issue involves core First Amendment rights to exchange information in the public forum about topics of immense importance to both the individuals involved and society at large. This Court should grant review to resolve the conflict and to correct the First Circuit's departure from guideposts clearly established by this Court in *Hill*.

II. THE DECISION BELOW GOES FAR BEYOND WHAT THIS COURT SUSTAINED IN *HILL*

Since it was decided more than ten years ago, this Court's decision in *Hill* has figured prominently in lower court decisions addressing speech restrictions both in the abortion context and more broadly.[7] Proper un-

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[7] As to abortion, in addition to the *McCullen/McGuire* cases and *Hoye*, *see, e.g.*, *Brown*, 586 F.3d at 269-273. In other contexts *see, e.g.*, *Menotti* v. *City of Seattle*, 409 F.3d 1113, 1124-1125, 1141 n.52 (9th Cir. 2005) (sustaining restrictions designed to cover exact time and perimeter of trade organization meeting); *Shuger* v. *State*, 859 N.E.2d 1226, 1232-1233 (Ind. App. 2007), *transfer denied*, 869 N.E.2d 454 (Ind. 2007) (sustaining Indiana Hunter Harassment Act); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 361 (6th

derstanding and application of *Hill* is thus a matter of considerable importance.

In its latest decision, for example, the court of appeals rejected petitioners' reliance on a number of this Court's recent First Amendment decisions[8] with the observation that this Court had not "retreat[ed] from its well-settled abortion clinic/buffer zone jurisprudence." App. 12a (citing *Hill* and *Madsen*). The threshold question is not, however, whether this Court has "retreat[ed]" from *Hill*, but whether *Hill* provides any basis for sustaining the abortion-specific, speaker-specific, complete-exclusion zones established by Massachusetts in the 2007 Act. It does not—or, if it does, then a retreat is in order.[9]

Cir. 2008) (sustaining restrictions limited to funerals). This broad use of *Hill* was predicted when the case was before the Court. *See, e.g.*, *Hill*, AFL-CIO Amicus Br., 1999 WL 1034471; PETA Amicus Br., 1999 WL 1032802; ACLU Amicus Br., 1999 WL 1045141.

[8] *E.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010) ("restrictions distinguishing among different speakers, allowing speech by some but not others" are "prohibited"); *Sorrell* v. *IMS Health*, 131 S. Ct. 2653, 2663-2664 (2011) (rejecting "content- and speaker-based restrictions" that "burden disfavored speech by disfavored speakers"); *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219-1220 (2011) (rejecting tort liability where other speakers "would not have been subject to liability").

[9] *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* has been "condemned by progressive and conservative legal scholars alike"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 734-738 (2001) (critiquing *Hill*'s First Amendment analysis); Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001) (quoting Laurence Tribe's description of *Hill* as

In upholding Colorado's no-unconsented-approach law in *Hill*, the Court expressly relied on three critical safeguards: equal applicability to all medical facilities; equal applicability to all speakers; and a narrowly tailored focus on the exact evil to be avoided (close, unwanted physical approaches) that preserved the practical ability both to proffer leaflets and to reach willing listeners from a conversational distance. The First Circuit's application of *Hill* in the absence of those safeguards dramatically expands the decision's reach. And its departure from core First Amendment principles has been influential, both in the abortion context[10] and beyond.[11]

"slam-dunk simple and slam-dunk wrong"); *id.* at 747-750 (quoting Prof. McConnell's critique of *Hill*); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001) ("Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest facade of neutrality.").

[10] *See, e.g.*, *Clift* v. *City of Burlington, Vt.*, 2013 WL 609180, at *18 (D. Vt. Feb. 19, 2013) (relying on *McCullen I* and *McGuire I* to sustain buffer-zone exemptions for abortion clinic speakers); *Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I*, *McGuire II*, and this case to uphold no-approach buffer zone that applies only at abortion clinics and exempts clinic speakers), *rev'd*, 653 F.3d 835, 849 (9th Cir. 2011); *Brown*, 586 F.3d at 269, 271, 274-276, 283 n.22 (citing *McGuire I*, *McGuire II*, and *McCullen I* in upholding 15-foot no-entry zone with exception for clinic employees).

[11] *See, e.g.*, *Spingola* v. *Village of Granville*, 39 F. App'x 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to uphold ordinance outlawing public speaking at permitted events unless speech occurs in "designated speaking areas," deeming law facially constitutional because "there is at least one legitimate reason for the Ordinance, crowd control"); *Ross* v. *Early*, 758 F. Supp. 2d 313, 322

A. The Massachusetts Act Is Not Neutral

As explained above, the Colorado no-unconsented-approach law upheld in *Hill* applied broadly at all health care facilities on the theory that patients of all kinds might be "in particularly vulnerable physical and emotional conditions." 530 U.S. at 729. In contrast, Massachusetts has created exclusion zones only "where abortions are offered or performed." § 120E1/2(a)-(b). The First Circuit viewed this narrow focus as a virtue: "combating the deleterious secondary effects of anti-abortion protests" while otherwise "restrict[ing] as little speech as possible." *McGuire I*, 260 F.3d at 44; App. 104a-105a (incorporating analysis).

This Court in *Hill*, however, emphasized the danger of such a narrow focus. "The *comprehensiveness* of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." 530 U.S. at 731 (emphasis added). As *Hill* explained, a speech-restrictive statute "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Id.* at 723.

Moreover, the Massachusetts Act, unlike the Colorado statute, is not viewpoint-neutral but expressly distinguishes between those who work for an abortion clinic from those who do not. Speaking the language of rational basis scrutiny, the First Circuit has permitted such distinctions as "rational" and "legitimate" based on a legislative desire to prefer speech that facilitates

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(D. Md. 2010) (relying on *McCullen I* in holding there is "no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message.").

abortion, and a legislative prediction that women prefer hearing speech from clinic speakers. *McGuire I*, 260 F.3d at 44, App. 166a. As explained above, this is not "the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725.

B. The Act Is Far More Restrictive Than The Law Sustained In *Hill*

Hill relied heavily on the fact that Colorado's law barred only close, unwanted physical approaches. The Court observed, for example, that the law did "not affect demonstrators with signs who remain in place," or prevent a leafletter from pre-positioning herself inside the zone "near the path of oncoming pedestrians and proffering ... material ... which the pedestrians can easily accept." 530 U.S. at 726-727. These features of the law helped preserve "the right of every citizen to 'reach the minds of willing listeners,'" *id.* at 728, in part because they "allow[ed] the speaker to communicate at a 'normal conversational distance,'" *id.* at 726-727. In that regard, the Court specifically contrasted the 8-foot floating no-approach zone upheld in *Hill* with the 15-foot floating separation zone rejected in *Schenck* v. *Pro-Choice Network*, 519 U.S. 357, 377 (1997). *See* 530 U.S. at 726-727. Under these circumstances, the Court accepted the restrictions as narrowly tailored to the State's interest in protecting potentially vulnerable incoming patients from non-consensual encounters. *Id.* at 729.

In sharp contrast to *Hill*, the Massachusetts Act creates flat no-entry zones forbidding public forum speech for more than 70 feet (35 in all directions) around each entrance to an abortion clinic.[12] These

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[12] In practice, most zones are much closer to 100 feet. App. 52a, 60a.

zones remain open for exempt speakers, but for petitioners, any entry to speak is criminal, no matter how peaceful or welcome, and regardless of whether any incoming women are in the zone at all. Gone is the right preserved in *Hill* to address willing listeners.[13] Gone is the right to stand still on the sidewalk holding a sign.[14] Gone is the right to distribute leaflets.[15] Gone is the right to offer help at a normal conversational distance.[16] In their place, Massachusetts and the court of appeals offer the ability to stand outside the exclusion zone and shout (their "voices are audible" and can "elicit audience reaction"), "us[e] sound amplification equipment," hold signs ("placards are visible"), or "wear evocative garments ... dressing up as, say, the Grim Reaper." App. 23a.

Petitioners' suit, however, is not about the right to "dress[] up as ... the Grim Reaper"—as the court of appeals might have recognized if it had taken seriously the evidence supporting petitioners' as-applied chal-

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[13] *See, e.g., Berger* v. *City of Seattle*, 569 F.3d 1029, 1056 (9th Cir. 2009) (en banc) (invalidating as overbroad a rule prohibiting "'speech activities' within thirty feet of a 'captive audience,'" in part because it applied to "both welcome and unwelcome communications").

[14] *See, e.g., Berger*, 569 F.3d at 1056.

[15] *See, e.g., Hill*, 530 U.S. at 727; *Madsen*, 512 U.S. at 769 ("handbilling and solicitation" cannot be "completely banned in public places").

[16] *See, e.g., New York ex rel. Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 204 (2d Cir. 2001) ("The zone imposes a severe burden on First Amendment rights by effectively preventing protestors from picketing and communicating from a normal conversational distance."); *Sabelko* v. *City of Phoenix*, 120 F.3d 161, 165 (9th Cir. 1997) (First Amendment protects ability to speak from normal conversational distance).

lenge. Petitioners seek to engage their fellow citizens in peaceful, consensual, normal conversation, like civilized adults, on public sidewalks.[17] This is core protected First Amendment activity. *See, e.g., McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression ... [and] no form of speech is entitled to greater constitutional protection"). As a matter of basic First Amendment law, the government cannot foreclose leafleting and civilized, consensual conversation simply because it would be possible to get attention with more bombastic approaches. Rather, narrow tailoring requires the government to focus only on "appropriately targeted evil[s]." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988); *see also Board of Airport Comm'rs* v. *Jews for Jesus*, 482 U.S. 569, 575 (1987) ("no conceivable government interest" can support a complete prohibition on First Amendment activity in even a limited public forum). Petitioners cannot "have the exercise of [their] liberty of expression in appropriate places abridged on the plea that it may be exercised," less civilly, "in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

In short, unless *Hill* is read to upend longstanding First Amendment principles, it cannot be used to force petitioners to shout, wear costumes, or chase women around the painted lines in place of engaging in civilized consensual conversation. Alternatively, if *Hill* does permit abortion-specific, speaker-specific criminalization of peaceful speech with willing listeners and peace-

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[17] Petitioners' evidence showed that their message of love and help is very different from the individual seen in costume at the Worcester clinic, who is not involved in this case. App. 22a.

ful leafleting on a public sidewalk, it should be revisited and overruled.

C. As Applied to Petitioners, The Act Does Not Leave Open Ample Alternatives

Finally, as to the lone issue upon which the courts below permitted a factual trial—whether the Act allows adequate alternatives for petitioners' speech, *see* App. 5a-6a, 20a—the evidence confirmed that petitioners' alternatives are wholly inadequate.

As the Ninth Circuit recognized in *Hoye*, "an alternative is not ample if the speaker is not permitted to reach the intended audience." 653 F.3d at 858 (internal quotation marks and alterations omitted). Here, petitioners made a compelling showing that completely excluding them from large portions of public sidewalk near abortion clinics virtually destroys their ability to convey their particular message.

As described at pp. 11-14 above, in the district court petitioners explained and supported their view that women often have abortions because of financial or other pressures, feeling they have no real alternative. Petitioners seek to reach this unique audience with a message of love and support and offers of concrete assistance. They testified, however, that in order to be effective these messages must be conveyed through personal communication from a conversational distance, with a calm voice, caring demeanor, and eye contact. In particular, shouting from a distance is ineffective and counter-productive. Likewise, even potential listeners who would in fact welcome a message about alternatives to abortion will not make the effort to accept proffered literature bearing that message unless it can be placed near their hands in a peaceful, non-threatening manner.

Thus, for example, petitioners testified without contradiction that in their experience close, personal, peaceful communication with women approaching an abortion clinic can be very effective, while shouting or holding up a sign from a distance is not. Respondents offered nothing to rebut petitioners' evidence that, for example, the 2007 Act has prevented petitioner McCullen from having more than 2,000 conversations that she could likely have initiated except for the Act's fixed exclusion zones. Similarly, petitioner Zarrella made more than 100 successful offers of help before the Act went into effect, but has been unable to make a single successful offer since.

Respondents likewise offered nothing to rebut petitioners' evidence showing that, even when they can begin conversations, those conversations are shorter, louder and have different content than when petitioners are permitted to speak without the restrictions imposed by the Act's exclusion zones. They offered nothing to rebut testimony from petitioners Bashour and Clark about how far away petitioners are forced to stand in Worcester, or how petitioners are now effectively unable to distribute any literature to incoming cars. And they offered nothing to rebut testimony from petitioner Shea about his inability to distribute literature or begin conversations while avoiding the five exclusion lines painted around all public entrances at the Springfield clinic. To the contrary, respondents' own witnesses confirmed that the only effective communication they witnessed on the streets and sidewalks around abortion clinics was the sort of personal conversation that the Act severely restricts.[18]

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[18] The court of appeals erred in suggesting that an as-applied challenge cannot be based on how the Act's requirements interact

These demonstrated circumstances make clear that, as to petitioners, the option of shouting from a distance or chasing women around the outside of painted exclusionary zones is not a reasonable alternative to calm, kind, civilized, non-confrontational offers to converse made by one adult to another on a public sidewalk. And that situation brings this case squarely within the reasoning of this Court's decision in *City of Ladue* v. *Gilleo*, which invalidated a restriction on certain residential lawn signs.

In *Ladue*, the city argued that it remained possible to convey a message by many other means, such as "*hand-held* signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." 512 U.S. at 56 (citing city's brief). The Court rejected the proposition that these other means were adequate alternatives under the particular circumstances of the case:

> [A] sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' ... Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an

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with the characteristics of a particular clinic location. App. 24a; *compare Hill*, 530 U.S. at 730 ("Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied."); *Hoye*, 653 F.3d at 858-859 (as-applied question is based on "particular facts" and "actual circumstances," and "the factual predicate of an as-applied challenge does not need to be created by the State").

> audience that *could not be reached nearly as well by other means*.

Id. at 56-57 (emphasis added).

Here, too, there are certainly ways in which petitioners may communicate outside the Act's exclusion zones: standing outside the lines and shouting, carrying signs, waving leaflets at women from a distance, or even occasionally engaging an approaching woman in a hurried conversation before she crosses the painted boundary of the zone and the speaker must stop short. On this record, however, undisputed evidence from both sides confirms that these alternatives do not give petitioners an effective chance to reach their audience at the locations at issue. Rather, calm, peaceful, personal communication of the sort the Act renders almost impossible "carries a message quite distinct from," and provides "information about the identity of the speaker" quite unlike what can be conveyed by a sign, a shout, or a hurried half-conversation carried on while keeping one eye out to be sure to stop outside the State's exclusion line. *Ladue*, 512 U.S. at 56. Here, as in *Ladue*, the particular audience cannot "be reached nearly as well by other means." *Id.* at 57. The First Circuit therefore erred in holding that the Act leaves open adequate alternative channels for petitioners' speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 12-1334

ELEANOR MCCULLEN ET AL,
Plaintiffs, Appellants,

v.

MARTHA COAKLEY ET AL.,
Defendants, Appellees.

Jan. 9, 2013
[2013 WL 85928]

Petition for Review of an Order of the
Board of Immigration Appeals

Before BOUDIN,* SELYA and STAHL, Circuit Judges.

SELYA, Circuit Judge.

This case does not come to us as a stranger. At the turn of the century, the Massachusetts legislature passed a law that created fixed and floating buffer

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* Judge Boudin heard oral argument in this matter and participated in the semble, but he did not participate in the issuance of the panel's opinion. The remaining two panelists have issued the opinion pursuant to 28 U.S.C. § 46(d).

zones around abortion clinics. We rejected serial challenges to the constitutionality of that law. *See McGuire v. Reilly (McGuire I)*, 260 F.3d 36 (1st Cir. 2001) (rejecting facial challenge); *McGuire v. Reilly (McGuire II)*, 386 F.3d 45 (1st Cir. 2004) (rejecting as-applied challenge). The Supreme Court denied certiorari. 544 U.S. 974, 125 S.Ct. 1827, 161 L.Ed.2d 724 (2005).

One might have thought that the matter would end there, but it did not. In 2007, the legislature revisited the statute and amended it to create a fixed thirty-five-foot buffer zone around the entrances, exits, and driveways of abortion clinics. The revised statute drew renewed fire and, in 2009, we upheld it against a facial challenge. *See McCullen v. Coakley (McCullen I)*, 571 F.3d 167 (1st Cir. 2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 1881, 176 L.Ed.2d 362 (2010). This decision left open the plaintiffs' as-applied challenge, and they unsuccessfully pursued that initiative in the district court. *See McCullen v. Coakley (McCullen II)*, 759 F.Supp.2d 133 (D.Mass.2010) (granting judgment on the pleadings on certain issues); *McCullen v. Coakley (McCullen III)*, 844 F.Supp.2d 206 (D.Mass.2012) (resolving remaining issues after trial).

The plaintiffs again appeal. They advance a salmagundi of arguments, old and new, some of which are couched in a creative recalibration of First Amendment principles.

Few subjects have proven more controversial in modern times than the issue of abortion. The nation is sharply divided about the morality of the practice and its place in a caring society. But the right of the state to take reasonable steps to ensure the safe passage of persons wishing to enter healthcare facilities cannot seriously be questioned. The Massachusetts statute at

issue here is a content-neutral, narrowly tailored time-place-manner regulation that protects the rights of prospective patients and clinic employees without offending the First Amendment rights of others. We therefore affirm the judgment below.

I. BACKGROUND

We briefly recount the historical background and travel of the case and then describe the particular circumstances concerning the three clinic locations that lie at the epicenter of the plaintiffs' as-applied challenge.

A. *Travel of the Case.*

The centerpiece of this saga is Mass. Gen. Laws ch. 266, § 120E 1/2 (2007) (the Act). The provenance and pertinent provisions of the Act are set out in some detail in *McCullen I*, 571 F.3d at 172-74, and we assume the reader's familiarity with that account. We rehearse here only what is necessary to place into perspective the issues on appeal.

The Act states in pertinent part that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility" (RHCF) within a designated and clearly marked buffer zone. Mass. Gen. Laws ch. 266, § 120E 1/2(b), (c). The buffer zone spans

> a radius of 35 feet of any portion of an entrance, exit or driveway of a[n RHCF] or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a[n RHCF] in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Id. § 120E 1/2(b). Four categories of persons identical to those enumerated in the 2000 version of the law are exempted:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.
>
> *Id.*

On January 25, 2008, the Massachusetts Attorney General sent a letter to a wide audience, including RHCF personnel and law enforcement agencies. The text of the letter is reproduced as an appendix to our opinion in *McCullen I*, 571 F.3d at 184. Its stated purpose is to summarize the provisions of the Act and offer "guidance to assist [ ] in applying the four exemptions."

On January 16, 2008, the plaintiffs brought this action against the Massachusetts Attorney General in the federal district court.[1] Invoking 42 U.S.C. § 1983, they alleged a plethora of constitutional claims.

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[1] The plaintiffs who remain in the case—others have come and gone—are Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Eric Cadin, Cyril Shea, Nancy Clark, and Mark Bashour. There has also been some movement on the defense side of the ledger: the plaintiffs have now added as defendants three district attorneys, each of whom has jurisdiction over a county in

The district court bifurcated the case, separating the plaintiffs' facial challenge from their as-applied challenge. In due season, the court addressed the facial challenge and upheld the Act.

On appeal, we affirmed, holding the Act to be content-neutral, viewpoint-neutral, and a valid time-place-manner regulation. *McCullen I*, 571 F.3d at 176-81 & n.2. At the same time, we rebuffed the plaintiffs' overbreadth claim, citing *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), in which the Supreme Court upheld a Colorado statute regulating communicative activities within 100 feet of healthcare facility entrances. *See McCullen I*, 571 F.3d at 181-82. We likewise rejected the plaintiffs' vagueness claim (which focused on the Attorney General's letter), explaining that such an attempt at interpretive guidance cannot alter the meaning of a law that is clear on its face. *Id.* at 182-83. Finally, we ruled that the Act did not constitute an unlawful prior restraint on protected speech. *Id.* at 183-84.

When the dust had settled, the district court took up the plaintiffs' as-applied challenge. As a threshold matter, it invoked the law of the case doctrine and resisted the plaintiffs' attempt to reargue the facial constitutionality of the Act. *McCullen II*, 759 F.Supp.2d at 136-41. Next, it granted the defendants' motion for judgment on the pleadings with respect to seven as-applied counts. *Id.* at 141-45. Turning to whether the Act, as applied, constituted a valid time-place-manner regulation, the court concluded that the only trialworthy issue concerned the adequacy of alternative channels of communication at the challenged facilities. *Id.* at

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which one of the three specified clinics, *see infra* Part I(B), is located.

145. Following a bench trial, the court upheld the Act as applied. *McCullen III*, 844 F.Supp.2d at 213-25.

B. *The Three Sites.*

We rehearse the evidence anent the relevant clinic locations. As a prelude, we note that each of the plaintiffs engages in communicative activities outside one of these three RHCFs.

1. ***Boston.*** The Boston clinic is situated in a free-standing building at 1055 Commonwealth Avenue (a main thoroughfare in the Brighton section of Boston). Its front door faces Commonwealth Avenue; its rear garage entrance faces Gardner Street. All clinic patients enter through the front door and must use the twenty-five-foot-wide public sidewalk along Commonwealth Avenue. Buffer zones, marked with yellow arcs and posted signs, are appurtenant to each entrance.

Three of the plaintiffs (McCullen, Cadin, and Zarrella) regularly engage in "sidewalk counseling" at the Boston clinic. McCullen parks her car on Commonwealth Avenue and festoons it with pro-life signage; Zarrella sometimes prays aloud; and Cadin from time to time holds aloft a large pro-life sign.

A fourth plaintiff, Smith, has demonstrated outside the Boston clinic for many years. He has displayed a crucifix, sung religious hymns, and prayed aloud. His prayers are meant to be heard by passersby in hopes of persuading them to opt against abortion. He sometimes brings a loudspeaker to amplify group prayers that occur outside the clinic on the second Saturday of every month and on Good Friday.

The plaintiffs insist that they have achieved success in their counseling efforts: they speak with prospective patients, elicit responses, and hand out litera-

ture. In some instances, they have persuaded women to decide against terminating pregnancies. McCullen estimates that, during the period between November 2007 and May 2011, her sidewalk counseling convinced approximately eighty women to refrain from seeking abortions.

Despite their accomplishments, the plaintiffs argue that the buffer zones prevent close personal contact with their intended audience and, thus, impede their ability to communicate effectively. By way of illustration, Zarrella asserts that, although women "always" respond to her offers of enlightenment and assistance, she has not been able to convince any of them to opt out of an abortion since the 2007 buffer zones were put in place.

2. ***Worcester.*** The Worcester clinic is situated in a stand-alone building at 470 Pleasant Street. Its main entrance is accessible from Pleasant Street and also from a private parking lot behind the building. The public sidewalk on Pleasant Street is nearly fifty-four feet from the main door and staggered metal fences shield the front of the building and the private pedestrian walkway that runs between these points. Neither the fencing nor the walkway is on public property. The entrance to the parking lot is on Dewey Street and all vehicular traffic must use that entrance.

There are buffer zones marked with painted white arcs and posted signs on both Pleasant Street and Dewey Street. More than eighty-five percent of all patients arrive by car, park in the clinic's lot, and walk directly to the main door (without setting foot on any public way).

Two of the plaintiffs (Bashour and Clark) engage in sidewalk counseling at the Worcester clinic. They try

to divert women to Problem Pregnancy, a "pro-life pregnancy crisis center" located across the street. Bashour prays quietly outside the clinic, sometimes alone and sometimes with others. For her part, Clark often displays a large pro-life sign.

Here, too, the plaintiffs claim to have achieved some success in their counseling efforts. They speak with patients, distribute literature, and persuade women to refrain from seeking abortions. Notwithstanding these successes, the plaintiffs aver that the physical set-up renders their attempts to communicate "ineffective" by impeding their ability to view and approach individuals entering the front door, to make eye contact with patients, and to "demonstrate a caring demeanor." As they recall it, virtually no patients who park in the clinic's private lot respond to their overtures or "make the effort" to venture outside the clinic's premises. The buffer zones preclude them from speaking at "a normal conversational distance" with, or placing literature near, the vast majority of patients entering the clinic.

3. ***Springfield.*** The Springfield clinic is situated in a multi-tenant medical complex at the corner of Main Street and Wason Avenue. The building contains at least eight separate medical offices. It is bordered on two sides by private parking lots; a third side abuts another building; and the fourth side neighbors an open expanse that contains railroad trackage. Approximately ninety percent of individuals patronizing the complex arrive by car and park in one of the lots.

There are five driveways leading to and from the complex, two of which have been painted with white arcs and posted to establish buffer zones: one on Main Street and one on Wason Avenue. The remaining three driveways have painted white arcs but no signs. They

are not, therefore, buffer zones authorized by the Act. *See* Mass. Gen. Laws ch. 266, § 120E 1/2(c) (requiring signage to demarcate buffer zones). Consequently, they have no legal effect.

A plaintiff (Shea) prays aloud and engages in sidewalk counseling outside the clinic. He habitually displays a large sign that reads "They're Killing Babies Here." He laments that, from and after the creation of the buffer zones, he has not seen literature provided to anyone in a vehicle. He estimates that only five percent of those who arrive by car leave the clinic's parking lots either to accept pro-life literature or to investigate the possibility of counseling.

II. THE LAW OF THE CASE

We start our appraisal of the merits with the plaintiffs' exhortation that we revisit *McCullen I*, in which we held that the Act, on its face, is a constitutionally valid time-place-manner regulation. *See McCullen I*, 571 F.3d at 176-81. The district court found that the law of the case doctrine barred relitigation of this issue. *McCullen II*, 759 F.Supp.2d at 136-41. We agree.

The law of the case doctrine has two branches. The first, which embodies the so-called mandate rule, "prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case." *United States v. Matthews*, 643 F.3d 9, 13 (1st Cir. 2011) (internal quotation marks omitted). The second "binds a successor appellate panel in a second appeal in the same case to honor fully the original decision." *Id.* (internal quotation marks omitted). Both branches of the doctrine apply here.

To be sure, the law of the case doctrine admits of certain exceptions. But the circumstances giving rise to those exceptions are narrowly circumscribed:

> A party may avoid the application of the law of the case doctrine only by showing that, in the relevant time frame, controlling legal authority has changed dramatically; or by showing that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or by showing that the earlier decision is blatantly erroneous and, if uncorrected, will work a miscarriage of justice.

Id. at 14 (internal quotation marks omitted). Although the plaintiffs allude in desultory fashion to the third exception,[2] they make no reference to the second exception and their only colorable claim concerns the first exception.

The plaintiffs base their claim on recent decisions of the Supreme Court standing for the wholly unremarkable proposition that content-based and speaker-based speech restrictions are disfavored. *See, e.g., Sorrell v. IMS Health Inc.*, — U.S. —, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *Snyder v. Phelps*, — U.S. —, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). In their view, these neoteric decisions have so

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[2] For example, the plaintiffs use the phrase "serious injustice" twice in their opening brief. This ipse dixit does not suffice, however, to put in play the third exception to the law of the case doctrine. *See Ahmed v. Holder*, 611 F.3d 90, 98 (1st Cir. 2010) (explaining that "appellate arguments advanced in a perfunctory manner, unaccompanied by citations to relevant authority, are deemed waived"); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (similar).

reconfigured the First Amendment landscape as to justify a departure from the law of the case. This impressionistic argument, though ingenious, elevates hope over reason. The propositions for which the plaintiffs cite those cases are no more than conventional First Amendment principles recited by the Supreme Court in the context of factual scenarios far different than the scenario at issue here.

The decision on which the plaintiffs rely most heavily—*Citizens United*—is emblematic of this point. *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), which had held that corporate entities, as opposed to other speakers, could be prohibited from engaging in political speech. *Citizens United*, 130 S.Ct. at 886. The plaintiffs contend that *Citizens United* announced, for the first time, a blanket ban on all speaker distinctions, whatever the setting. This categorical ban, they say, should serve to invalidate the Act as a speaker-specific restriction.

This is an imprecise reading of *Citizens United*. The *Citizens United* Court held that government cannot entirely prohibit corporate political speech. *Id.* In support, it invoked the "central principle" laid out in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), to the effect "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, 130 S.Ct. at 903. The Act, of course, makes no such distinction.

The plaintiffs, however, are undaunted. They seize upon an isolated statement in *Citizens United*: "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."

See id. at 898. But they yank this statement from its context and they neglect to mention that the Court cites *Bellotti*—a case that substantially predates *McCullen I*—for this proposition. *See id.* at 898-99. The Court's reliance on *Bellotti* is not a mere fortuity. After all, the *Citizens United* Court described its decision as a return to classic First Amendment jurisprudence rather than a departure therefrom. *See id.* at 912. The Court did not retreat from its well-settled abortion clinic/buffer zone jurisprudence. *See, e.g., Hill*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Seen in this light, we cannot read *Citizens United* as undermining the First Amendment foundation on which our rejection of the plaintiffs' facial challenge rested.

So, too, *Snyder*, in which the Court held that the First Amendment precludes tort liability against persons who had peacefully protested, on public property, at the funeral of a Marine. *Snyder*, 131 S.Ct. at 1213-14, 1220-21. Once again, the Court did no more than apply long-recognized First Amendment principles. And while it reiterated the special status of public streets as the "archetype of a traditional public forum," it proceeded to confirm that even public fora are subject to reasonable time-place-manner regulations.[3] *Id.* at 1218 (internal quotation marks omitted). It is especially telling that, in making this point, the Court referred specif-

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[3] This formulation is reminiscent of *Hill*, 530 U.S. at 715, in which the Court recognized sidewalks and areas outside healthcare clinics as " 'quintessential' public forums" while upholding a buffer zone that limited communicative activities within those areas.

ically to the abortion clinic buffer zone that it had upheld in *Madsen*. *See id.*

The plaintiffs' reliance on *Sorrell* is equally mislaid. The *Sorrell* Court invalidated a Vermont law that restricted the sale, disclosure, and use of pharmacy records for marketing purposes. *Sorrell*, 131 S.Ct. at 2659. The law, on its face, was content-based and speaker-based, and had been enacted with the avowed purpose of "diminsh[ing] the effectiveness of marketing by manufacturers of brand-name drugs." *Id.* at 2662-63.

The case before us could not be more different. As we explained in *McCullen I*, 571 F.3d at 175-78, the Act is both content-neutral and speaker-neutral. Moreover, the legislature enacted it to serve a valid, non-speech-related purpose: public safety. *See id.* at 176.

In a Rumpelstiltskin-like effort to turn straw into gold, the plaintiffs dismiss these important differences and focus instead on the *Sorrell* Court's statement that "the inevitable effect of a statute on its face may render it unconstitutional." *Sorrell*, 131 S.Ct. at 2663 (internal quotation marks omitted). But this hoary legal precept (with which we agree) is not novel. The "inevitable effect" language derives from the Court's decision in *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which comfortably predates both our decision in *McCullen I* and the Supreme Court's abortion clinic/buffer zone jurisprudence.

More to the point, the *Sorrell* precept is in no way inconsistent with our holding in *McCullen I*. The "inevitable effect" of the Act is to limit the communicative activities of all demonstrators (whether pro-choice or pro-life) to exactly the same extent.

The plaintiffs have also marshaled other recent Supreme Court cases in their ambitious effort to reinvent First Amendment doctrine. *See, e.g., United States v. Stevens*, — U.S. —, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). It would serve no useful purpose to canvass these cases. For present purposes, it suffices that these decisions, by no stretch of even the most fertile imagination, sully either the reasoning or the doctrinal infrastructure of *McCullen I*.

The short of it is that the First Amendment principles underpinning our core holdings in *McCullen I* have not been materially altered, let alone abrogated, by any subsequent Supreme Court precedent. Accordingly, the district court did not err in declining the plaintiffs' invitation to set the law of the case doctrine to one side and revisit the plaintiffs' facial challenge to the Act.

III. JUDGMENT ON THE PLEADINGS

The plaintiffs challenge the district court's entry of judgment on the pleadings on several fronts. We review de novo an order granting or denying judgment on the pleadings. *Mass. Nurses Ass'n. v. N. Adams Reg'l. Hosp.*, 467 F.3d 27, 31 (1st Cir. 2006). To withstand a motion for judgment on the pleadings, a "complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012) (internal quotation marks omitted).

A. *Viewpoint Discrimination.*

The plaintiffs' principal challenge to the entry of judgment on the pleadings relates to their claim of viewpoint discrimination. They argue that Planned Parenthood employees and agents have abused the buffer zones and that this activity constitutes viewpoint

discrimination under the First Amendment. The district court rejected this argument on the pleadings, holding that the plaintiffs had not alleged sufficient facts to support the claim. *See McCullen II*, 759 F.Supp.2d at 143-44.

In their complaint, the plaintiffs aver that "pro-choice advocates [ ] surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." They further aver that clinic "employees and/or agents stand idly on the public sidewalks and streets inside the [buffer] zone"—sometimes smoking, speaking with each other or on mobile phones, or drinking coffee—"even when clinic clients are not present."

Because this issue was resolved at the pleading stage, we assume arguendo that the raw facts are as the plaintiffs have alleged. The question remains, however, whether the depicted conduct can fairly be characterized as viewpoint discrimination attributable to the state. The plaintiffs say that it can. The Attorney General demurs.

We begin with the basics. The Act, on its face, is viewpoint-neutral. *See McCullen I*, 571 F.3d at 178 & n.2. Although it contains a "clinic employee" exemption, that exemption does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others.

The plaintiffs strive mightily to overcome this obstacle. They call our attention to the decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011). There, a municipal ordinance prohibited, within a 100–foot zone around entrances to RHCFs, any knowing or willful "approach within eight feet of an individual seeking en-

try to the clinic if one's purpose in approaching that person is to engage in conversation, protest, counseling, or various other forms of speech." *Id.* at 839. The Ninth Circuit concluded that the ordinance was constitutional on its face but unconstitutional as applied. *Id.* at 849, 856. It predicated this conclusion on a determination that the city did not evenly enforce the ordinance; rather, the city's actions manifested "a firm policy of enforcing the Ordinance ... only [against] efforts to persuade women approaching [RHCFs] ... *not* to receive abortions or other reproductive health services, and not [against] communications seeking to encourage entry into the clinic for the purpose of undergoing treatment." *Id.* at 849-50 (emphasis in original).

This case is at a considerable remove from *Hoye*. The *Hoye* court's finding of uneven enforcement was inevitable in light of the city's frank admission that it consciously "enforces the Ordinance in a content-discriminatory manner." *Id.* at 850. In contrast, the plaintiffs here have not pleaded any facts that might suffice to ground a claim of uneven enforcement.[4]

The conduct described, without more, has nothing to do with the First Amendment. While loitering in a buffer zone by an exempt person is not expressive in nature and arguably does not serve the purposes of the

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[4] The plaintiffs attempt to rely upon declarations and deposition testimony amplifying these allegations. We add, however, that even if we were free to consider these extraneous materials, they would not suffice to make out a claim of viewpoint discrimination. Such extraneous materials are beyond the scope of appellate review of a judgment on the pleadings. *See NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 8 (1st Cir. 2002); *Int'l. Paper Co. v. Town of Jay*, 928 F.2d 480, 482 (1st Cir. 1991).

Act, such conduct, simpliciter, does not prefer one viewpoint over another.[5]

What is more, the employees and agents about whom the plaintiffs complain are not state actors but—unlike the municipal police officers in *Hoye*—are agents of a private entity (Planned Parenthood). The Act allows these individuals to be in buffer zones under the clinic employee exemption. But to the extent that they have tried to use their exempt status either to advocate a particular point of view or to drown out the plaintiffs' message, there is no allegation that such behavior has been sanctioned by the state.

Another point is worth making. If the plaintiffs believed themselves to be aggrieved by the employee/agent behavior that they describe, the commonsense remedy would have been to complain to police officers or other state authorities. The pleadings are barren of any allegation that such a complaint was ever made.

The bottom line is that, to be cognizable, a claim of uneven enforcement requires state action. *See McGuire II*, 386 F.3d at 60 ("The First Amendment is concerned with government interference, not private jousting in the speech marketplace."). Whatever actions the clinic employees and agents may have taken, this record reveals no basis for a plausible claim that those actions reflect a viewpoint preference of the state. *See id.* at 59-60.

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[5] We say "arguably" because it may be necessary for escorts to spend idle time in the buffer zones in order to keep themselves available to assist incoming patients—a task consistent with the purpose of the exemption.

B. *Overbreadth.*

The plaintiffs assign error to the district court's entry of judgment on the pleadings with respect to their overbreadth claim. Although they concede that we rejected a substantially similar overbreadth claim in *McCullen I*, 571 F.3d at 181-82, they suggest that the Act may be overbroad in particular applications.

Overbreadth doctrine invalidates statutes "not because [the plaintiffs'] own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Hill*, 530 U.S. at 731-32 (internal quotation marks omitted). But overbreadth must be both "real" and "substantial," as assessed "in relation to the statute's plainly legitimate sweep." *Id.* at 732 (internal quotation marks omitted). "Where an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (emphasis in original). Thus, the appropriate analysis "requires consideration of many more applications than those immediately before the court." *Id.* at 485.

In the case at hand, the parties spar over whether there is such a creature as an as-applied overbreadth challenge. *Compare, e.g., Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006) (asserting that "[a]ll overbreadth challenges are facial challenges"), *with, e.g., Turchick v. United States*, 561 F.2d 719, 721 n.3 (8th Cir. 1977) (suggesting the contrary). We need not grapple with this conundrum because, even if some overbreadth

challenges may contain an as-applied component, this one does not.

In explaining the district court's supposed error, the plaintiffs repeat their complaint, rejected on their facial challenge, that all communicative activities (as opposed to, say, purely violent or aggressive activities) are banned within buffer zones. In attempting to convert this previously rejected challenge into a viable as-applied challenge, they posit that *McCullen I* cannot control because it did not specifically conclude whether the Act is substantially overbroad at the Boston, Worcester, and Springfield locations. Withal, they offer no accompanying factual allegations, other than pointing to what they identify as five buffer zones at the Springfield location. As we already have explained, *see supra* Part I(B)(3), only two enforceable buffer zones exist around the Springfield clinic. Thus, our Springfield-directed analysis considers only those two zones.

We need not tarry. Here, as in *Hill*, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." 530 U.S. at 731. The plaintiffs have not pleaded facts sufficient to suggest that our earlier holding in *McCullen I* does not control their present claim. Accordingly, the claim fails under the plausibility standard. It follows that the district court did not err in granting judgment on the pleadings on the overbreadth claim.

C. *Other Claims.*

The plaintiffs attempt to resurrect a number of other claims that the district court laid to rest in its entry of judgment on the pleadings. *See McCullen II*, 759 F.Supp.2d at 143-45. There are two principal problems.

First, the plaintiffs have not pleaded an adequate factual predicate. In the absence of pleaded facts sufficient to distinguish the plaintiffs' as-applied challenge on these grounds from their failed facial challenge, the latter controls the former. *See McGuire II*, 386 F.3d at 61-62; *Repub. Nat'l. Comm. v. FEC*, 698 F.Supp.2d 150, 157 (D.D.C.), *aff'd mem.*, — U.S. —, 130 S.Ct. 3544, 177 L.Ed.2d 1119 (2010).

Second, the plaintiffs do not pursue this battery of claims with developed argumentation or in any other meaningful way. We routinely have held, and today reaffirm, that theories presented on appeal in a perfunctory fashion are deemed abandoned. *See, e.g., Ahmed v. Holder*, 611 F.3d 90, 98 (1st Cir. 2010); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). So it is here.

IV. THE AS–APPLIED CHALLENGE

We turn next to the red meat of this appeal: the plaintiffs' as-applied challenge to the operation of the Act at the three specific RHCFs described above. The district court spurned this challenge; it concluded that because there are adequate alternative channels of communication open to the plaintiffs at each location, the Act comprises a valid time-place-manner regulation. *McCullen III*, 844 F.Supp.2d at 225. We review this conclusion de novo. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Sullivan v. City of Augusta*, 511 F.3d 16, 24-25 (1st Cir. 2007).

With respect to time-place-manner regulations, the Supreme Court has explained:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided

> the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (internal quotation marks omitted); *see Bl(a)ck Tea Soc'y. v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004). The district court found that the issues of content neutrality and narrow tailoring were definitively resolved by *McCullen I*. *See McCullen III*, 844 F.Supp.2d at 210; *see also McCullen II*, 759 F.Supp.2d at 145. The plaintiffs lament that this approach "improperly narrowed the required constitutional analysis."

We reject this lamentation. The facts proffered by the plaintiffs in support of their as-applied challenge do not raise new or different issues but, rather, repeat in relevant part the same fact patterns envisioned in our adjudication of their failed facial challenge. *See, e.g.*, *McCullen I*, 571 F.3d at 179-80. It is black-letter law that a plaintiff cannot rewardingly prosecute an as-applied challenge to the constitutionality of a statute based on the same legal arguments and factual predicate that underpinned an earlier (unsuccessful) facial challenge. *See In re Cao*, 619 F.3d 410, 430 (5th Cir. 2010); *McGuire II*, 386 F.3d at 61.

The congruence between the plaintiffs' facial and as-applied challenges cannot be gainsaid. The plaintiffs now attempt to raise precisely the same arguments about content neutrality and the significance of the governmental interest involved that were squarely raised (and squarely repulsed) in the course of their fa-

cial challenge. *See McCullen I*, 571 F.3d at 175-78. The same can be said of the narrow tailoring inquiry. *See id.* at 178-80. In any event, to the extent that the as-applied challenge in this case implicates particularities of the three clinic locations, those particularities are swept into—and appropriately addressed by—the inquiry into the availability of adequate alternative means of communication. *See, e.g., Hill*, 530 U.S. at 725-30 (blending these two analyses).

This brings us to the pivotal question of whether the Act, as applied, leaves open adequate alternative means of communication. Each of the plaintiffs engages in communicative activities outside one of the three designated RHCFs. According to the plaintiffs, these communicative activities are intended to influence individuals seeking or considering abortions as well as "those who approve or perform abortions."

The plaintiffs vouchsafe that they prefer to communicate their message through up-close, gentle conversations, accompanied by smiles and eye contact. They insist that the buffer zones authorized by the Act force them to engage in shorter, louder, and less personal exchanges. They fear that, without the ability to "make eye contact and demonstrate a caring demeanor," their communications are ineffectual. As they see it, the need to stop at the edge of the buffer zone is devastating; this restriction compels them to raise their voices, precludes them from handing literature to prospective patients in many instances, detracts from their message, and somehow makes them seem "untrustworthy."

Notwithstanding the plaintiffs' importunings, the court below concluded that adequate alternative means of communication exist at all three sites. *See McCullen*

III, 844 F.Supp.2d at 225. Our inquiry focuses on this set of conclusions.

The record makes plain that communicative activities flourish at all three places. To begin, the plaintiffs and their placards are visible to their intended audience. Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. When they and their cohorts deem it useful to do so, they congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments. They sometimes don costumes (dressing up as, say, the Grim Reaper).

To be sure, the Act curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles. But as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication. *See McCullen I*, 571 F.3d at 180 (explaining that "the Constitution neither recognizes nor gives special protection to any particular conversational distance"); *see also Marcavage v. City of New York*, 689 F.3d 98, 107 (2d Cir. 2012) (explaining that alternative channels need not "be perfect substitutes" nor indulge a speaker's preference for particular modes of communication). In the last analysis, "there is no constitutional requirement that demonstrators be granted ... particularized access" to their desired audience. *Bl(a)ck Tea Soc'y.*, 378 F.3d at 14. As long as adequate alternative means of communication exist, the First Amendment is not infringed.

Our inquiry into the adequacy of alternative means of communication is, of course, site-specific. *See, e.g., Hill*, 530 U.S. at 730. At the Boston clinic, all prospective patients must traverse a public sidewalk to gain entry. Given this reality, many channels of communication remain available to the plaintiffs. Those alternative channels are adequate to offset the restrictions inherent in the buffer zones.

The analysis is somewhat different with respect to Worcester and Springfield. At these sites, it is not the buffer zones that constitute the main impediment to communicative activity; instead, it is the prospective patients' unwillingness to venture off the clinics' private property. Most prospective patients arrive by car, park in private lots, and use non-public walkways to enter the facility. The fact that these patients are not readily accessible to the plaintiffs is more a function of the physical characteristics of the sites than of the operation of the Act.

This is a critically important datum. The law does not require that a patient run a public-sidewalk gauntlet before entering an abortion clinic. That patients choose to stay on private property or not to stop their cars on approach is a matter of patient volition, not an invidious effect of the Act. First Amendment rights do not guarantee to the plaintiffs (or anyone else, for that matter) an interested, attentive, and receptive audience, available at close-range.

One additional observation seems appropriate. In the context of abortion-related demonstrations, the Supreme Court has specifically recognized the interest of clinic patients both "in avoiding unwanted communication" and "pass [ing] without obstruction." *See Hill*, 530 U.S. at 716-18 (internal quotation marks omitted).

Consistent with this interest, the First Amendment does not compel prospective patients seeking to enter an abortion clinic to make any special effort to expose themselves to the cacophony of political protests. *See id.* at 716. Nor does it guarantee to the plaintiffs the same quantum of communication that would exist in the total absence of regulation. A diminution in the amount of speech, in and of itself, does not translate into unconstitutionality. *Sullivan*, 511 F.3d at 44. So long as adequate alternative means of communication exist, no more is constitutionally exigible.

We add a coda. Even if the plaintiffs' audience is diminished in some respects by the existence of the buffer zones, that diminution is not constitutionally fatal. The fact that a regulation "may reduce to some degree the potential audience for [the plaintiffs'] speech is of no consequence," as long as adequate alternative means of communication exist. *Ward*, 491 U.S. at 802.

In an effort to change the trajectory of the debate, the plaintiffs tout the Supreme Court's decision in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). That decision is inapposite here.

Gilleo involved a municipal ordinance that broadly banned residential signs. *Id.* at 45. Analyzing the ordinance as a time-place-manner regulation, the Court assumed the validity of the city's content-neutral justification and acknowledged its valid governmental interest in limiting "visual clutter." *Id.* at 53-54. But the Court took account of the peculiar characteristics of home-lawn signs and the "special respect for individual liberty in the home" and concluded that the ordinance failed to leave open adequate alternative means of communication. *Id.* at 56-58. Of particular pertinence for present purposes, the Court explicitly contrasted

the home-lawn sign context with "the government's need to mediate among various competing uses, including expressive ones, for public streets." *Id.* at 58. The case at hand falls solidly within the latter context and, thus, outside *Gilleo's* precedential sweep.

One further point must be made. The decision in *Gilleo* predates the Court's abortion clinic/buffer zone line of cases. *See, e.g., Hill,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597; *Schenck v. Pro–Choice Network of W. N.Y.,* 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997); *Madsen,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593. The Court's majority in these cases never even mentions *Gilleo.* It would make no sense to wrest *Gilleo* from its contextual moorings and use it as a wedge to subvert the Court's later decisions addressed to the much different problem of how the First Amendment operates when the special concerns of public-sidewalk protests around abortion clinics are at stake.

We summarize succinctly. On this record, it is readily apparent that, notwithstanding the buffer zones authorized by the Act, adequate communicative channels remain available to the plaintiffs, including oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups. The Act is, therefore, a valid time-place-manner regulation as applied to the Boston, Worcester, and Springfield RHCFs.

V. LEAVE TO AMEND

In a last-ditch effort to save the day, the plaintiffs asseverate that the district court erred in denying them leave to amend their complaint to include a direct challenge to the Attorney General's letter. We review for abuse of discretion a district court's denial of a mo-

tion to amend a complaint. *Hatch v. Dep't. for Children, Youth & Their Families*, 274 F.3d 12, 19 (1st Cir. 2001). As a general proposition, a denial of a motion for leave to amend "will be upheld so long as the record evinces an arguably adequate basis for the court's decision," such as "futility, bad faith, undue delay, or a dilatory motive on the movant's part." *Id.*

The order challenged in this case falls within the rubric of undue delay. The district court took a balanced approach. It allowed the plaintiffs to make amendments at the margins of their complaint (for example, the addition of the three district attorney defendants, *see supra* note 1), but it refused to allow the plaintiffs to introduce a new theme at so late a date.

The plaintiffs' original complaint focused exclusively on the Act. The Attorney General issued the guidance letter within two weeks of the filing of the complaint, yet the plaintiffs chose to ignore it.[6] Not until September 17, 2010 did the plaintiffs seek to enlarge their target to include the Attorney General's letter. That was more than two-and-one-half years after the docketing of their original complaint. They have offered no compelling explanation for the delay. Given the passage of this inordinate period of time, we cannot say that the district court abused its discretion in drawing the line and refusing to allow the plaintiffs to refocus their attack. *See, e.g., Villanueva v. United States*, 662 F.3d 124, 127 (1st Cir. 2011) (per curiam); *Kay v. N.H. Dem. Party*, 821 F.2d 31, 34 (1st Cir. 1987) (per curiam). The plaintiffs had ample time to get their

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[6] This course of conduct hardly can be deemed an oversight. After all, the *McGuire* family of cases contained a failed as-applied challenge to an earlier (but similar) version of the Attorney General's letter. *See McGuire II*, 386 F.3d at 48, 52, 64.

ducks in a row, and the district court was under no obligation to give them more.

VI. CONCLUSION

We need go no further. For the reasons elucidated above, we affirm the judgment of the district court.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 08-10066-JLT

ELEANOR MCCULLEN, ET AL.,
Plaintiffs,

v.

MARTHA COAKLEY, ET AL.,
IN THEIR OFFICIAL CAPACITIES ONLY,
Defendants.

Feb. 22, 2012
[844 F. Supp. 2d 206]

* * *

MEMORANDUM

JOSEPH L. TAURO, District Judge.

I. *Introduction*

This case concerns a recently revised Massachusetts statute, Massachusetts General Laws Chapter 266, § 120E1/2 ("Act"), which establishes a thirty-five-foot fixed buffer zone around driveways and entrances of reproductive health care facilities ("RHCFs"). Presently at issue is Plaintiffs' challenge to the Act as applied to their speech activities at three RHCFs in Boston, Worcester, and Springfield. For the reasons given below, this court finds that the Act as applied is a valid regulation of the time, place, and manner of Plaintiffs'

speech. For that reason, Judgment shall be entered in favor of Defendants on all counts.

II. *Background*[7]

A. *The Parties*

Plaintiffs Eleanor McCullen, Jean Blackburn Zarella, Gregory A. Smith, Eric Cadin, Mark Bashour, Nancy Clark, and Cyril Shea are Massachusetts residents who regularly engage in pro-life counseling outside RHCFs. Defendant Attorney General Martha Coakley is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts. Defendants Conley, Early, and Mastroianni are the [209] District Attorneys for Suffolk, Worcester, and Hampden Counties where the clinics at issue in this action are located. As such, Defendants bear responsibility for enforcing the Act. They are sued in their official capacities only.[8]

B. *Procedural History*

On January 16, 2008, Plaintiffs filed the Complaint, which advanced eight counts under 42 U.S.C. § 1983: (1) Free Speech—Time, Place, and Manner; (2) Free Speech—Substantial Overbreadth; (3) Free Speech—Prior Restraint; (4) "Free Speech—Free Association—Free Exercise Hybrid"; (5) Free Speech—Viewpoint Discrimination; (6) Due Process—Vagueness; (7) Due Process—Liberty Interest; and (8) Equal Protection.[9]

After a Status Conference held on April 23, 2008, and without objection from the Parties, this court or-

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[7] This court assumes familiarity with its previous decision in this case, *McCullen v. Coakley* ("*McCullen I*"), 573 F.Supp.2d 382 (D.Mass. 2008) but, nonetheless, presents a condensed background.

[8] *See* Am. Compl. 3-4 [# 112].

[9] Compl. ¶¶ 13-22 [# 1].

dered that the matter proceed on the merits in two stages: (1) a Bench Trial on Plaintiffs' facial challenge; and (2) a bench trial on Plaintiffs' as-applied challenge.[10]

On May 28, 2008, this court held the first bench trial, on Plaintiffs' facial challenge.[11] In an August 22, 2008 decision, this court held that the Act survived all three facial challenge standards.[12] The Court of Appeals for the First Circuit held a de novo review and affirmed this court's decision,[13] and the Supreme Court denied Plaintiffs' petition for certiorari at this stage of the case.[14]

On September 17, 2010, Plaintiffs filed a *Motion for Leave to File Amended Complaint* and a *Motion to Permit Arguments as to Facial Invalidity*. On October 7, 2010, Defendants filed a *Motion for Judgment on the Pleadings on the As-Applied Claims in Counts Two Through Eight*. On December 2, 2010, this court heard oral arguments on all three *Motions* and took them under advisement. On December 29, 2010, this court issued a *Memorandum* denying Plaintiff's *Motion to Permit Arguments as to Facial Invalidity*, and allowing Defendant's *Motion for Judgment on the Pleadings*. Plaintiffs were allowed to amend the complaint to include claims regarding RHCFs in Springfield and

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[10] Order [# 34].

[11] *McCullen I*, 573 F.Supp.2d at 386.

[12] *Id.* at 425. This court held that the Act was constitutional under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. *Id.*

[13] *McCullen v. Coakley* ("*McCullen II*"), 571 F.3d 167 (1st Cir. 2009).

[14] *McCullen v. Coakley* ("*McCullen III*"), — U.S. —, 130 S.Ct. 1881, 176 L.Ed.2d 362 (2010).

Worcester and to include new plaintiffs who would make allegations regarding speech activities at those clinics. Plaintiffs were also permitted to amend the complaint to include four District Attorneys in their official capacities, consistent with the expansion of the geographic scope of the complaint.

On February 25, 2011, Plaintiffs filed the *Amended Complaint*, and on March 11, 2011, the Commonwealth filed its *Answer*. On May 11, 2011, the parties entered a *Stipulation of Dismissal Covering the Claims by Carmel Farrell Regarding the Brookline Clinic*. The effect of the *Amended Complaint* and the *Stipulation* is that Plaintiffs now challenge the constitutionality of the Act as applied at the RHCFs in Boston, Worcester, and Springfield. On August 24, 2011, a bench trial was held on Plaintiffs' as applied claims, and the court took the matter under advisement.

[210] III. *Discussion*

A. *Legal Standard*

This court has already found the Act to be a content neutral time, place and manner restriction, and upheld it as facially valid. In so doing, the court found that the Act survived intermediate scrutiny because it is (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant governmental interest; and (3) leaves open ample alternative means of communication.[15] It has already been established that the Commonwealth of Massachusetts has a "substantial and legitimate content-neutral interest in protecting public safety at RHCF entrances and driveways, because '[i]t is a traditional exercise of the States'

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[15] *McCullen I*, 573 F.Supp.2d at 402 (setting out the standard for intermediate scrutiny).

police powers to protect the health and safety of their citizens.'"[16] In light of this court's December 29, 2010 opinion, the only issue that remains to be decided is "whether the statute as applied at the clinics specified in the complaint leaves open adequate alternative channels of communication."[17]

A valid time, place, and manner restriction, by its nature must burden some First Amendment activity for the purpose of advancing the State interest at stake. As Justice Souter, emphasized, in his concurring opinion in *Hill v. Colorado*, however, prior cases "'quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[18] Indeed, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[19] As this court pointed out in the facial challenge phase of this case, "[t]ime-place-manner regulations routinely make particular forms of expression impracticable without raising constitutional

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[16] *Id.* at 410 (quoting *Hill v. Colorado*, 530 U.S. 703, 715, 120 S.Ct. 2480, 2489, 147 L.Ed.2d 597 (2000)).

[17] Memorandum and Order [# 111] at 9.

[18] *Hill*, at 736, 120 S.Ct. 2480 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)); (also quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).

[19] *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (Citing *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)); *Poulos v. New Hampshire*, 345 U.S. 395, 405, 73 S.Ct. 760, 97 L.Ed. 1105 (1953); *see Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

concerns."[20] The question is not, "'whether a degree of curtailment' of speech exists, but rather 'whether the remaining communicative avenues are adequate.'"[21] Alternative methods, therefore, need not be perfect substitutes for Plaintiffs' desired manner of communication.

It is well established that, "only the government can violate First Amendment rights," and that, "every First Amendment claim thus requires state action in some sense."[22] As the [211] First Circuit has emphasized, "The First Amendment is concerned with government interference, not private jousting in the speech marketplace."[23] In order for the Act to violate the First Amendment as it is applied to Plaintiffs, the lack of adequate alternative means of communication must be traceable to state action. As the First Circuit pointed out in *McGuire II*, when it upheld the Commonwealth's previous buffer zone law, "there is no state action if what the plaintiff is really aiming at are the acts of private persons that are actually illegal under the statutory scheme, because then the acts do not

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[20] *McCullen v. Coakley*, 571 F.3d 167, 180 (1st Cir. 2009).

[21] *Sullivan*, 511 F.3d at 44 (quoting *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 59 (1st Cir. 1999), and quoting in turn *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 745 (1st Cir. 1995)).

[22] *McGuire v. Reilly* ("*McGuire II*"), 386 F.3d 45, 60 (1st Cir. 2004) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001); *Hudgens v. NLRB*, 424 U.S. 507, 514-21, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (First Amendment claim required state action; claim against private shopping center for preventing peaceful labor picketing failed because shopping center was not a state actor); *Yeo v. Town of Lexington*, 131 F.3d 241, 248, 255 (1st Cir. 1997)).

[23] *McGuire II*, 386 F.3d at 60.

reflect the policy of the state."[24] To succeed here, Plaintiffs' facial challenge must demonstrate that the act, as applied by the state, does not leave open adequate alternative means of communication. That other barriers to communication not attributable to the state may exist is irrelevant to the First Amendment analysis.

Much like the Plaintiffs in the *McGuire II* case, the Plaintiffs in this action challenge the Act as-applied after it has already been upheld as a facially valid time-place-manner restriction. As in that case, "The fact situation that plaintiffs are involved in here is the core fact situation intended to be covered by this buffer zone statute, and it is the same type of fact situation that was envisioned by this court when the facial challenge was denied."[25] Plaintiffs are, therefore, precluded from "argu[ing] that they are different types of actors, or that they are involved in a different type of fact situation, from the ones on the basis of which the law was already upheld facially."[26]

In upholding the Act as facially valid, this court found that the Act left open ample alternative means of communication. The court noted that,

> as long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or

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[24] *Id.*, 386 F.3d at 60 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940-41, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

[25] *McGuire II*, 386 F.3d at 61.

[26] *Id.*

> counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.[27]

As the Supreme Court has emphasized, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[28] This court has also found in *McCullen I* that, "[a]lthough slightly closer physical interaction may partially enhance one's ability to sidewalk counsel RHCF patients, there is no constitutional right to that level of particularized access."[29]

The First Circuit, "has upheld ... alternative means of communication despite **[212]** diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience."[30]

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[27] *McCullen v. Coakley*, 573 F.Supp.2d 382, 413 (D.Mass. 2008).

[28] *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

[29] *McCullen I*, 573 F.Supp.2d at 415.

[30] *Sullivan v. City of Augusta*, 511 F.3d 16, 44 (1st Cir. 2007) (citing *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 192-94 (1st Cir. 1996)); *see also D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 59 (1st Cir. 1999) ("The essence of this question is not 'whether a degree of curtailment' of speech exists, but rather 'whether the remaining communicative avenues are adequate.'" (quoting *Nat'l Amusements*, 43 F.3d 731, 745 (1st Cir. 1995)).

In analyzing alternative channels of communication, it is clear that, "'[e]ven protected speech is not equally permissible in all places and at all times,'"[31] and "the law does not require that alternative channels be 'perfect substitutes.'"[32] With these constraints in mind, the court now turns to the question of how the Act is applied at the three RHCFs at the heart of Plaintiffs' complaint.

B. *Application*[33]

Plaintiffs challenge the application of the Act at three RHCFs: one in Boston, one in Worcester, and one in Springfield.[34] This court has already found that the Act, on its face, leaves open ample alternative means of communication because protestors may engage in any form of communication with their intended audience so long as they do not do so inside a clearly marked and posted buffer zone during clinic business hours.[35] The First Circuit, in its de novo review of this court's ruling, similarly found that:

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[31] *Snyder v. Phelps*, — U.S. —, 131 S.Ct. 1207, 1218, 179 L.Ed.2d 172 (2011) (quoting *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)).

[32] *Int'l Action Cent. v. City of New York*, 587 F.3d 521, 528 (2d Cir. 2009) (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006)).

[33] The Parties stipulated to the content of the record at trial. [# 128]. All citations are, accordingly, made to that record.

[34] *See* Am. Compl. [# 112]. Plaintiffs dismissed all claims regarding the Brookline clinic. *See* Stipulation of Dismissal [# 126].

[35] *McCullen v. Coakley*, 573 F.Supp.2d 382, 413-15 (D.Mass. 2008).

> To begin, the 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone.
>
> Additionally, the Plaintiffs may stand on the side-walk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

From the evidence contained in the Joint Trial Record, it is clear that the Act, as applied at each of the three challenged RHCFs, leaves open ample adequate alternative means of communication. This court will examine each clinic location in turn.[36]

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[36] At oral argument in this case, Plaintiffs asserted that inclement weather should be taken into account in determining whether the Act is constitutional as applied. *See* e.g. Trial Tr. [# 150] at 67-69. It is clear, however, that inclement weather makes commu-nication more difficult regardless of whether there is a buffer zone in place. The fact that it rains and snows cannot, therefore, make a facially valid time, place and manner re-striction unconstitutional as applied. *See Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990) (holding that street musician who was subject to an ordinance banning amplified music on subway platforms had adequate alternative channels of communication, and rejecting Plaintiff's argument that above-ground venues were inadequate because "inclement weather often precludes performing above ground").

[213] 1. *Boston Clinic*

A. *Clinic Layout and Buffer Zones:*[37]

Planned Parenthood: Greater Boston Health Center ("Boston PP") is a stand-alone building located at 1055 Commonwealth Avenue in the Allston-Brighton neighborhood of Boston.[38] It sits on the corner of Commonwealth Avenue and Alcorn Street. All patients must enter Boston PP through the Commonwealth Avenue entrance.[39] The Commonwealth Avenue entrance is set back approximately 12 feet from the sidewalk inside a recessed open foyer. Clinic staff and patrons must cross the public sidewalk to enter Boston PP's front door.

There is a clearly marked and posted buffer zone around Boston PP's Commonwealth Avenue entrance:

> This buffer zone is an arc that begins to the left of the building entranceway, as one looks out from the clinic, at a point 22 feet, 7 inches from the eastern edge of the foyer entrance; the buffer zone then arcs to a point one foot away from the edge of Commonwealth Avenue directly opposite that foyer edge. In accord with the act, the buffer zone then extends for the width of the open foyer in straight lines the extra foot to Commonwealth Avenue. The buffer zone then jogs back to one foot away from Commonwealth Avenue, at a point directly opposite the western edge of the foyer (to the

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[37] All clinic measurements are taken from the Parties' Stipulation *Regarding Buffer Zone Measurements* ("Stip.") [# 129].

[38] Stip. [# 129] at 1.

[39] Baniukiewicz Tr. [# 137] at 79-80, 89-90.

> right of the front door as one looks out from the entranceway), arcs across the corner of the sidewalk to a point that is even with the edge of the building and about four feet, four inches into Alcorn Street, and finally continues back across the Alcorn Street sidewalk until it hits the side of the building roughly twelve feet north from the corner of the building.[40]

Plaintiffs and others who wish to communicate with clinic patrons may do so while standing: (1) on the wide sidewalk to the east of the Commonwealth Avenue entrance; (2) in the fairly narrow strip between the top of the buffer zone and Commonwealth Avenue; and (3) while standing on the sidewalk across Alcorn Street.[41] Boston PP places a large orange barrel in the street in order to keep traffic away from protesters standing outside the buffer zone at the corner of Alcorn Street and Commonwealth Avenue.[42] On days when large numbers of protesters are expected at the Boston PP, the Boston Police place barriers several feet into Commonwealth Ave, which creates extra room for people who wish to engage in communicative activities directed at clinic patrons.[43]

There is also a clearly marked and posted buffer zone around Boston PP's rear garage entrance, but

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[40] Defendants' Proposed Findings of Fact [# 147] at 9-10 (Stip. [# 129] ¶¶ 3-9).

[41] McCullen Tr. [# 130] at 45-58, 68, 72; Metzger Tr. [# 138] at 84-86; Metzger Dep. Ex. 11 [# 138-11].

[42] Baniukiewicz Tr. [# 137] at 12-13; Zarella Tr. [# 132] at 32-33.

[43] Zarella Tr. [# 132] at 38-39; Baniukiewicz Tr. [# 137] at 84-85.

Plaintiffs do not engage in protest or other communication in that location.[44]

[214] B. *Speech Activities*

Plaintiffs Eleanor McCullen, Jean Blackburn Zarella, Gregory A. Smith, and Eric Cadin all engage in protest and counseling at Boston PP. Each plaintiff's activities at Boston PP will be addressed in turn.

i. *Eleanor McCullen*

Plaintiff Eleanor McCullen engages in sidewalk counseling outside Boston PP on Tuesday and Wednesday mornings between seven and eleven a.m.[45] She frequently works with another sidewalk counselor Mary O'Donnell.[46] Ms. McCullen attempts to identify women or couples going to the clinic, and offers those individuals help and alternatives to abortion.[47] Ms. McCullen's goal is to engage women in conversations, and to convince them to come to a "Safe Center" instead of going in to Planned Parenthood.[48] She also hands out pamphlets with information about alternatives to abortion and available services.[49] Each morning that she engages in sidewalk counseling, Ms. McCullen hands out between fifteen and twenty pam-

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[44] [# 129] ¶¶ 4 & 10. McCullen Decl. [# 139]. ¶¶ 6 & 8; McCullen Tr. [# 130] at 5-7.

[45] McCullen Tr. [# 130] at 5.

[46] *Id.* at 6.

[47] *Id.* at 6-10.

[48] *Id.* at 10.

[49] *Id.* at 15-19.

phlets.[50] Ms. McCullen and Ms. O'Donnell coordinate their counseling efforts so that one of them can reach clinic patrons entering Boston PP from either side of the buffer zone.[51]

Ms. McCullen estimates that about once a week she convinces a woman to come to a safe center instead of going in to Planned Parenthood.[52] Since the buffer zone law went into effect in November of 2007, Ms. McCullen estimates that, through her sidewalk counseling, she has been able to persuade eighty women not to have abortions.[53] Ms. McCullen does not carry a sign when she is at the clinic, but she does place three signs on her car, which she parks directly in front of the clinic.[54] Two of the signs read, "Abortion stops a beating heart," and another offers pregnancy help.[55] On Tuesday and Wednesday mornings when Ms. McCullen goes to Boston PP, there are no clinic escorts or police officers present.[56] She has observed others outside the clinic engage in counseling and prayer, as well as other forms of protest.[57]

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[50] *Id.* at 13.

[51] *Id.* at 13-14.

[52] *Id.* at 10.

[53] *Id.* at 29-31.

[54] *Id.* at 50.

[55] *Id.* at 50. *See also* McCullen Tr. [# 130] Exhibit 5.

[56] *Id.* at 32.

[57] *See id.* at 31-45.

ii. *Jean Blackburn Zarella*

Plaintiff Blackburn Zarella goes to Boston PP between seven a.m. and about ten a.m. on Saturdays, and she also occasionally goes for a short time on Wednesday mornings.[58] While she is at the clinic, Ms. Zarella aims to speak with and offer help to women who are planning to have an abortion.[59] Ms. Zarella reaches out to clinic patrons by saying, "May I help you? I have a lot of help available."[60] Clinic patrons always respond to this offer of help, by saying either "yes" or "no."[61] Ms. Zarella also testified that, on days she is at [215] Boston PP, between one and four women entering the clinic will stop and speak with her.[62] When a woman does stop to speak with her, Ms. Zarella offers the woman literature to show what help is available.[63] In addition to her counseling, Ms. Zarella also hands out literature, and about half of everyone who passes by accepts literature from Ms. Zarella.[64] She also prays near the clinic, sometimes silently, and sometimes aloud.[65] On some days, Ms. Zarella is joined by another counselor who puts up antiabortion signs around the buffer zone.[66]

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[58] Zarella Tr. [# 132] at 6-7.

[59] *Id.* at 7-8.

[60] *Id.* at 8.

[61] *Id.* at 8.

[62] *Id.* at 8-9.

[63] *Id.* at 9.

[64] *Id.* at 11.

[65] *Id.* at 12.

[66] *Id.* at 28-29.

On the second Saturday of every month, there is a rosary vigil outside Boston PP.[67] At the vigil approximately thirty people gather to say twenty decades of the rosary.[68] People participating in the rosary vigil stand outside the buffer zone in a police barrier, and often carry large signs.[69] One regular vigil participant also carries a crucifix on a large pole.[70] Annually, on Good Friday, Ms. Zarella and other protesters also say the fourteen stations of the cross out loud.[71]

iii. *Gregory A. Smith*

Plaintiff Gregory Smith goes to Boston PP once a week on Saturday mornings between eight and nine-thirty a.m. When he goes to Boston PP, there are usually about ten or more other people engaging in protest activities outside the clinic.[72] Mr. Smith carries a crucifix on an eight-foot pole outside the buffer zone while he prays the rosary out loud, and in unison with the other people gathered at the clinic.[73] Other people gathered outside the clinic on Saturday mornings display signs.[74] On the second Saturday of the month there is a larger group of people outside Boston PP, and

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[67] *Id.* at 38.

[68] *Id.* at 38.

[69] *Id.* at 39-41.

[70] *Id.* at 41.

[71] *Id.* at 43.

[72] Smith Tr. [# 133] at 6-7.

[73] *Id.* at 7-8.

[74] *Id.* at 13.

Mr. Smith uses a loudspeaker to amplify the prayer.[75] Mr. Smith has testified that his goal in holding the crucifix and praying outside Boston PP is to "support[ ] in prayer [the] counselors so that they have success in talking the girls out of killing their babies."[76] People entering the clinic see Mr. Smith's crucifix and hear the prayers.[77] It is not uncommon for passerby who object to the pro-life message to shout at Mr. Smith and others engaged in prayer or counseling outside Boston PP.[78]

iv. *Eric Cadin*

Eric Cadin is a student at St. John's Seminary in Brighton.[79] He goes to Boston PP about once a month when class is in session, and once a week when it is not.[80] When Mr. Cadin is outside Boston PP, he tries to speak with women going in for an abortion and their companions. His **[216]** goal is to, "let [the women entering the clinic] know that there is all sorts of help available for them and that I and the people at these centers, and anyone else who is present at these things, really does care about them and wants to help them, and help their child."[81] On an average morning, Mr. Cadin will engage ten or more different women or cou-

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[75] *Id.* at 39-40.

[76] *Id.* at 18.

[77] *Id.* at 57.

[78] *Id.* at 21-23.

[79] Cadin Tr. [# 131] at 6.

[80] *Id.* at 6.

[81] *Id.* at 21.

ples in conversation.[82] Mr. Cadin also hands out literature that advises clinic patients about information and services that are available.[83] On a typical morning outside the clinic, he hands out about twenty to thirty pieces of literature to people passing by.[84] Occasionally, Mr. Cadin holds a sign, but he mostly attempts to engage people in conversation.[85] Since the Act came into force in November, 2007, he estimates that, through his counseling activity, he has convinced more than ten women not to have abortions.[86]

C. *Other Observations at Boston PP*

Michael Baniukiewicz, who heads Planned Parenthood's security operations, has observed protesters outside Boston PP to hold prayer vigils, distribute literature, and display signs.[87] The protesters' signs can be easily read from "just about anywhere on the street within the buffer zone area."[88] On the second Saturday of each month, a large number of people gather at Boston PP, and the Boston Police put up barriers to protect the protesters.[89] Mr. Baniukiewicz testified that he can hear protesters and counselors calling out to clinic patrons from his post inside the front door

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[82] *Id.* at 14.

[83] *Id.* at 18.

[84] *Id.* At 19.

[85] *See id.* at 14

[86] *Id.* at 24-25.

[87] Baniukiewicz Tr. [# 137] at 81-83.

[88] *Id.* at 82.

[89] *Id.* at 85.

of the clinic.[90] Three or four times a day a clinic patron will walk in to Boston PP with pro-life literature that they have been handed.[91]

Kristen Metzger is an investigator with the Massachusetts Attorney General's Office.[92] On April 2, 2010, Ms. Metzger visited Boston PP.[93] That day was Good Friday, and Ms. Metzger observed a group of about seventy-five people gathered reciting a Catholic prayer.[94] She also saw a group of three counselors engage a young Hispanic woman in conversation.[95] After the conversation the young woman got in to a car with the counselors and they drove away together.[96] While she was at the clinic, Ms. Metzger was able to hear protesters' pro-life statements, and she was able to read their signs.[97]

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[90] *Id.* at 85-86.

[91] *Id.* at 87-88.

[92] Metzger Tr. [# 138] at 6.

[93] *Id.* at 9.

[94] *Id.* at 9, 19.

[95] *Id.* at 14.

[96] *Id.* at 17.

[97] *Id.* at 9-19.

D. *Availability of Adequate Alternatives*[98]

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[98] At oral argument in this case, Plaintiffs addressed at length the activities of clinic escorts at Boston PP. *See* Trial Tr. [# 150] at 39-41.

> As the First Circuit held in *McGuire v. Reilly*, "The First Amendment is concerned with government interference, not private jousting in the speech marketplace." *McGuire II*, 386 F.3d 45, 60 (1st Cir. 2004) (finding that "'enforcement' of a state statute by purely private individuals, without some involvement by state officials, does not constitute state action."). Plaintiffs rely on the Ninth Circuit's recent opinion in *Hoye v. City of Oakland* for the proposition that the activities of clinic escorts must be taken into account in an as-applied challenge.
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> The *Hoye* case is, however, distinct from this case in several important ways. First, the plaintiff in *Hoye* did allege that a facially neutral buffer zone law was being enforced against pro-life advocates, but not against pro-choice clinic escorts, thus meeting the state action requirement. *Hoye*, 653 F.3d 835, 855 (9th Cir. 2011) ("[P]laintiffs are generally required to show the existence of an unconstitutional policy by extrapolating from a series of enforcement actions. They must argue, in effect, that these actions demonstrate that the municipality is enforcing against them a rule that is distinct from the constitutionally valid enactment."). Second, the Ninth Circuit found that, in determining whether the attempts of escorts to drown out Plaintiff's speech foreclosed ample alternative channels of communication, "[Plaintiff] will bear the burden of showing that it is the *Ordinance's requirement* ... not the activities of escorts alone, that deprives him of ample alternative means of communication." *Id.* at 859.
>
> Because this court is bound by the First Circuit's holding in the *McGuire II* case, and because Plaintiffs have not alleged state action in the manner set out above, the activities of clinic escorts are not relevant to Plaintiffs' as-applied challenge and are, therefore, not addressed in this opinion.

In light of the testimony in this case, it is clear that adequate alternative [217] means of communication exist for Plaintiffs to communicate their pro-life message at Boston PP. While it is beyond doubt that a "degree of curtailment" exists because of the application of the buffer zone law at Boston PP, it is also evident that Plaintiffs are still effective in communicating their message to their intended audience: women going to Planned Parenthood for abortion services.[99] As the Supreme Court emphasized in *Hill v. Colorado*, "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as 'the most comprehensive of rights and the most valued by civilized men.'"[100]

The evidence in this case demonstrates that, even though the buffer zone exists, the plaintiffs are still successful in convincing a number of women not to have abortions.[101] Individuals entering the clinic can read Plaintiffs' signs, and clinic patients can hear Plaintiffs' prayers. Plaintiffs successfully hand out literature to people walking toward the clinic from either direction, and Plaintiffs' requests for conversation can be heard by clinic patrons both before and after they enter the buffer zone. That more people don't accept Plaintiffs' offers is not an indication that adequate alternative

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[99] *See* Trial Tr. [# 150] at 22.

[100] *Hill v. Colorado*, 530 U.S. 703, 716-17, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)).

[101] McCullen Tr. [# 130] at 29-30.

means of communication do not exist, but rather shows that many members of Plaintiffs' audience are simply unreceptive to Plaintiffs' message.

As the depositions submitted to the court and the arguments at trial show, Plaintiffs can be seen and heard by both willing and unwilling listeners approaching the main entrance to Boston PP. The record does not indicate that there are any barriers that would prevent willing listeners from stepping outside of the buffer zone to engage in a more in-depth conversation with the Plaintiffs in this case. It is evident that while Plaintiffs may indeed suffer some curtailment in their avenues of communication because of the buffer zone law, they are still able to effectively reach their intended audience. It is clear from the case law that, "restrictions on the time, [218] place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[102] The Act as applied at Boston PP, therefore, leaves open adequate alternative means of communication for Plaintiffs' message.

2. *Worcester Clinic*

A. *Clinic Layout and Buffer Zones*

Planned Parenthood: Central Massachusetts Health Center ("Worcester PP") is located at 470 Pleasant Street in Worcester, Massachusetts.[103] The clinic is on Pleasant Street, near the intersection with

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[102] *Hill*, 530 U.S. at 736, 120 S.Ct. 2480 (Souter, J. concurring) (quoting *Ward*, 491 U.S. at 797, 109 S.Ct. 2746 (quoting in turn *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985))).

[103] Stip. [# 129] at ¶ 12.

Dewey Street, and it has been at this location since December 2009.[104] The entrance to the clinic's parking area is around the corner on Dewey Street.[105] The main door to the Worcester PP building is recessed under the overhang of the building, and is accessible from the parking lot or from a walkway that leads out to Pleasant Street.[106]

> The walkway leads from the door through two metal fences to the sidewalk along Pleasant Street next to the clinic building; that sidewalk is eight and a half feet wide. The fences are staggered, with one closer to Pleasant Street than the other. For a pedestrian to access the Worcester clinic's main door from Pleasant Street, she must walk through a fairly narrow gap in the two fences, which are six feet, one inch apart at their nearest point. The door is fifty-three feet, nine inches from the public sidewalk on Pleasant Street, measured in a straight line.[107]

Most clinic patients drive to Worcester PP and park in the lot before walking to the clinic entrance.[108]

There are two marked and painted buffer zones at Worcester PP: one on Pleasant Street, and one on

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[104] *Id.* at ¶¶ 12-13; Bashour Tr. [# 136] at 4.

[105] Stip. [# 129] at ¶ 12.

[106] *Id.* at ¶ 14.

[107] Defendants' Proposed Findings of Fact [# 147] at 24 (citing Stip. [# 129] at ¶¶ 14, 17).

[108] Bashour Decl. [# 145] ¶ 29; Clark Decl. [# 144] ¶ 23.

Dewey Street.[109] The buffer zone on Pleasant Street surrounds the entrance to the concrete walkway leading to Worcester PP's front door.[110] It begins thirty-five feet to the left of the walkway, and extends thirty-five feet to the right of the walkway.[111] It extends in to Pleasant Street, but does not reach the sidewalk on the other side.[112] The arc on Dewey Street surrounds the driveway entrance to the Worcester PP parking lot.[113] The buffer zone arc is a total of ninety-three feet, seven inches from edge to edge along the Dewey Street sidewalk.[114] At its widest point, the buffer zone extends five feet, eight inches beyond the street curb opposite the driveway.[115]

B. *Speech Activities*

Plaintiffs Nancy Clark and Mark Bashour submitted deposition testimony and [219] declarations detailing their speech activities at Worcester PP.

i. *Nancy Clark*

Plaintiff Nancy Clark has been going to the Planned Parenthood clinic in Worcester two to three days a week since the clinic opened in December of

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[109] Stip. [# 129] at ¶ 15.

[110] *Id.* at ¶ 16.

[111] *Id.* at ¶ 17.

[112] *Id.*

[113] *Id.* at ¶ 19.

[114] *Id.*

[115] *Id.*

2009.[116] She generally goes to the clinic in the mornings between nine-thirty and eleven,[117] and she usually stands by the clinic and prays.[118] She also attempts to start conversations with girls entering the clinic, and to encourage clinic patrons to visit Problem Pregnancy, a pro-life counseling center located across the street from Worcester PP.[119] Ms. Clark successfully begins a conversation with a girl outside the clinic about once a week.[120] She also distributes pamphlets.[121] On days when she isn't engaging in counseling, Ms. Clark prays the rosary while holding a sign that says "Face It, Abortion Kills."[122] When Ms. Clark holds the sign, clinic patrons and others seem to notice the sign and respond to it in both positive and negative ways.[123] On one occasion, a girl noticed Ms. Clark holding the sign, came out of the clinic to speak with Ms. Clark, and ultimately decided not to have an abortion.[124] Ms. Clark estimates that she has convinced approximately four girls not to have an abortion since she began counseling outside Worcester PP.[125] She has also spoken with four

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[116] Clark Tr. [# 135] at 5-6.

[117] *Id.* at 7.

[118] *Id.* at 7.

[119] *Id.* at 7-9.

[120] *Id.* at 14-15.

[121] *Id.* at 15.

[122] *Id.* at 16.

[123] *Id.* at 17-18.

[124] *Id.* at 18-19.

[125] *Id.* at 28.

or five women outside Worcester PP who then decided to accompany Ms. Clark to Problem Pregnancy.[126]

Ms. Clark testified at her deposition that many times clinic patrons don't want to speak with her or don't want the pamphlets she offers.[127] During Catholic Lent, protesters outside Worcester PP engage in "40 Days of Life," where they pray for an end to abortion.[128] Participants in the "40 Days of Life" often pray aloud and sometimes use a microphone to amplify their prayer.[129] On Thursdays, a man named Ray dresses up as the grim reaper and stands outside Worcester PP.[130] Ms. Clark has observed people react to Ray in his costume in both positive and negative ways.[131] Different protesters and counselors at the Worcester PP stand in different locations around the clinic and are varied in their activities.[132]

ii. *Mark Bashour*

Plaintiff Mark Bashour has gone to Worcester PP about twice a week since the clinic moved to its current location in December 2009.[133] He generally stands on Pleasant Street on the same side of the street as the

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[126] *Id.* at 42.

[127] *Id.* at 13-16.

[128] *Id.* at 24-25.

[129] *Id.* at 24-26.

[130] *Id.* at 49.

[131] *Id.* at 50-51.

[132] *See id.* at 49-60.

[133] Bashour Tr. [# 136] at 4-5.

clinic.[134] Although most patients drive to the Worcester PP, on occasion **[220]** a woman or her boyfriend will leave the private parking lot to speak with Mr. Bashour.[135] He estimates that he has had a "good conversation" with a clinic patron about six or seven times since December 2009.[136] Mr. Bashour also distributes literature outside the clinic, and successfully hands his pamphlets to someone "[a] couple of times a week."[137] Mr. Bashour also engages in prayer outside Worcester PP, either silently or aloud, alone and with others.[138] About five or six times, Mr. Bashour has participated in bringing a woman who was on her way to Worcester PP to Problem Pregnancy instead.[139] Mr. Bashour describes his goal as, "to save as many lives as possible, because every time a child is aborted, we have a death."[140] In a typical day, he will call out to between eight and twelve women in an attempt to start a conversation.[141] In his deposition, Mr. Bashour testified that ten to fifteen percent of the time the women he calls out to respond to his efforts in either a positive or a negative way.[142] He sometimes talks to other counselors outside Worcester PP, and has observed other counselors bring

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[134] *Id.* at 15-16.

[135] *Id.* at 16-17.

[136] *Id.* at 17.

[137] *Id.* at 23.

[138] *Id.* at 24-25.

[139] *Id.* at 27-30.

[140] *Id.* at 37.

[141] *Id.* at 76-77.

[142] *Id.* at 78-80.

women to Problem Pregnancy.[143] He is also familiar with other protestors who go to Worcester PP to either pray or hold signs that convey an anti-abortion message.[144]

C. *Other Observations at Worcester PP*

At Worcester PP, Michael Baniukiewicz has observed protesters hold signs and hand out information. He has also observed one man dressed up as the grim reaper.[145] Protesters' signs can be read from twenty to thirty feet away, and the protesters can be heard from Worcester PP's parking lot.[146] On days when abortions are being performed, three or four patrons, on average, enter the clinic with pro-life literature[147]

Ms. Metzger visited Worcester PP in her capacity as an investigator for the Attorney General's office on September 10, 2010.[148] When Ms. Metzger parked in a lot near the Worcester PP facility, she and her investigative partner were approached by a counselor who handed them pro-life literature and urged them to go across the street to Problem Pregnancy.[149] While in the parking lot at the Worcester PP facility, Ms. Metz-

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[143] *Id.* at 66-67.

[144] *See id.* at 68-76.

[145] Baniukiewicz Tr. [# 137] at 92.

[146] *Id.* at 93-95.

[147] *Id.* at 96.

[148] Metzger Tr. [# 138] at 20.

[149] *Id.* at 23-24.

ger could hear people calling to her from behind the facility's fence asking her to come talk to them.[150]

Ms. Metzger made a second visit to Worcester PP on July 7, 2011.[151] On that date, she observed about nine people standing on the sidewalk surrounding the buffer zone on Pleasant Street in front of the clinic.[152] One of the individuals was **[221]** wearing a grim reaper costume, and another held a sign that read "abortion is a bad sin."[153] On the opposite side of the sidewalk there were two women and a man, and there was a man across from the Dewey Street entrance with a sign that read, "God loves you mom and dad."[154] When Ms. Metzger exited the clinic and stood outside in front of the facility, she could hear a woman from across the street say, "anything you need, we can help you, come across the street."[155]

D. *Availability of Adequate Alternatives*

In assessing the availability of adequate alternative means of communication at Worcester PP, it is necessary to keep in mind that a First Amendment violation necessarily requires State action.[156] As the First Circuit pointed out in the *McGuire II* case, "only the government can violate First Amendment

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[150] *Id.* at 26-27.

[151] *Id.* at 42-43.

[152] *Id.* at 43.

[153] *Id.* at 43-44.

[154] *Id.* at 45-46.

[155] *Id.* at 47.

[156] *See McGuire v. Reilly*, 386 F.3d 45, 60 (1st Cir.2004).

rights."[157] Although Plaintiffs' arguments at trial drew attention to factors like the fencing on Worcester PP's clinic property, and the fact that most people park in a private parking lot,[158] these barriers to communication cannot be attributed to state action or the enforcement of the buffer zone law. They are, therefore, not state action as required to state a First Amendment violation.

As in *Hill*, this is a case where, "'[the fact that [the Act]] may reduce to some degree the potential audience for [petitioners'] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.'" The evidence in the record demonstrates that Plaintiffs' message can be heard by both willing and unwilling listeners as they enter Worcester PP. Plaintiffs successfully engage in prayer, protest, counseling, and literature distribution. That Plaintiffs experience both positive and negative reactions from passerby indicates that their message is being heard by their intended audience. While most women may choose to ignore Plaintiffs' well-meaning overtures, this is not because the Commonwealth has failed to leave open adequate alternative means of communication. Much as Plaintiffs have the right to attempt to engage others in conversation outside Worcester PP, clinic patrons who do not want to en-

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[157] *Id.* (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)); (*Hudgens v. NLRB*, 424 U.S. 507, 514-21, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976)).

[158] *See* Trial Tr. [# 150] at 71-73.

gage with Plaintiffs have a right to go about their business unmolested.[159]

As the Supreme Court has emphasized, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[160] Here, this court has already found the Act to be a facially valid content neutral time, place, and manner restriction. Based on the record presented, it is clear that the Act as applied at Worcester PP leaves open adequate alternative means of communication even [222] though it might not grant the level of "particularized access" that Plaintiffs would prefer.[161]

3. *Springfield Clinic*

A. *Clinic Layout and Buffer Zones*

Planned Parenthood's Western Massachusetts Health Center in Springfield ("Springfield PP") is lo-

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[159] *See Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

[160] *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (citing *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Poulos v. New Hampshire*, 345 U.S. 395, 405, 73 S.Ct. 760, 97 L.Ed. 1105 (1953); *see Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965)).

[161] *See McCullen v. Coakley*, 573 F.Supp.2d 382, 415 (D.Mass.2008) (discussing *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 13 (1st Cir.2004), "The court held ... that 'although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access.'").

cated at 3550 Main Street in Springfield Massachusetts.[162] It is part of a larger medical complex, which contains three buildings, and is located at the corner of Main Street and Wason Avenue.[163] There are seven other distinct medical businesses in this medical complex that have no affiliation with Springfield PP.[164]

The building that contains Springfield PP is set back three hundred sixteen feet, two inches from Main Street and two hundred six feet, five inches from Wason Avenue.[165] There are five driveways leading into the parking area for the medical complex, and each one has a sign saying, "private property, no trespassing."[166] Two of the driveways are surrounded by clearly marked and posted buffer zones.[167] The remaining three driveways are surrounded by painted arcs, but because the text of the buffer zone law is not posted at those driveways, the law has no effect in those locations.[168]

The first buffer zone is located around the driveway on Wason Avenue that is nearest to Springfield PP.[169] The zone is "roughly one hundred feet wide, in-

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[162] Stip. [# 129] at ¶ 22.

[163] *Id.*

[164] *Id.* at ¶ 23.

[165] *Id.*

[166] *Id.* at ¶ 24; Shea Decl. [# 143] at ¶ 15.

[167] Stip. [# 129] at ¶ 25.

[168] *See id.* at ¶¶ 28-32; *see also* Mass.G.L. c. 266 § 120E1/2, ¶ 9(c).

[169] Stip. [# 129] at ¶ 26.

cluding the width of the driveway itself."[170] The top of the buffer zone arc is twelve feet, five inches from the curb of Wason Avenue.[171] The second buffer zone surrounds the middle driveway on Main street.[172] It is approximately ninety-nine feet wide, including the width of the driveway itself.[173] The top of the buffer zone arc is twenty-one feet, four inches from the curb on the opposite side of Main Street.[174]

B. *Speech Activities*

Plaintiff Dr. Cyril Shea contests the application of the Act at Springfield PP. Dr. Shea protests outside Springfield PP at least once a week on Fridays, and sometimes on Wednesdays and Saturdays as well.[175] Dr. Shea goes to Springfield PP "to pray and to indicate to the public that abortions are taking place on that campus and to make that knowledge known."[176] Dr. Shea prays aloud outside Springfield **[223]** PP, sometimes alone and sometimes with others.[177] He also wears a sign around his neck that is about three-and-a-half feet by two-an-a-half feet that reads, "they're kill-

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[170] Defendants' Proposed Findings of Fact [# 147] at 30 (citing Stip. [# 129] at ¶ 26).

[171] Stip. [# 129] at ¶ 26.

[172] *Id.* at ¶ 27.

[173] *Id.*

[174] *Id.*

[175] Shea Tr. [# 134] at 7-8.

[176] *Id.* at 9.

[177] *Id.* at 11-12.

ing babies here."[178] Dr. Shea stands with his sign at various locations near the entrances to the parking lot of Springfield PP.[179] People often react both positively and negatively to Dr. Shea's sign.[180] Dr. Shea has also observed other people holding signs outside Springfield PP that convey a variety of pro-life or religious messages.[181] On occasion, Dr. Shea has been called over by another counselor who is speaking to a woman so that he can offer a medical perspective.[182] Prior to the enactment of the Act, Dr. Shea would stand on the sidewalk beside the Springfield PP's driveway entrance, and he would wave to people in their cars and ask if they needed any literature or help.[183] Occasionally drivers would respond to Dr. Shea's overtures, but more often people would keep driving in to the parking lot.[184] Since the buffer zones were painted at Springfield PP, Dr. Shea can recall one occasion on which a driver, angered by Dr. Shea's sign, stopped his car and spoke to him.[185] About five percent of people who drive to Springfield PP and park in the private parking lot come back out to the sidewalk to receive literature or counseling from pro-life protesters.[186]

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[178] *Id.* at 12.

[179] *Id.* at 15.

[180] *Id.* at 13-14.

[181] *Id.* at 23-24.

[182] *Id.* at 40-45.

[183] *Id.* at 83.

[184] *Id.* at 83-84.

[185] *Id.* at 84.

[186] *Id.* at 95-96.

C. *Other Observations at Springfield PP*

Most patients arrive at Springfield PP by car and enter the parking lot via the driveway on Wason Avenue.[187] Protesters at Springfield PP have been observed to hold signs and to try to slow down vehicles entering the driveway.[188] Protesters' signs can be read from cars entering the driveway, and the protesters can be heard from the clinic parking lot.[189] Because Springfield PP is part of a large medical complex, which is private property, protesters' activities are confined to the sidewalks surrounding the complex parking lot regardless of whether the buffer zones are in place.[190]

Ms. Metzger, as an investigator for the Attorney General's Office, visited Springfield PP on July 8, 2011.[191] On that date, she saw two men standing in the sidewalk outside the buffer zone holding up pro-life signs.[192] One of the men held up a pamphlet as Ms. Metzger drove by.[193] She also saw three men on Wason Avenue waving at cars that were exiting, and another man holding a framed picture of the Virgin Mary.[194]

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[187] Baniukiewicz Tr. [# 137] at 100-101.

[188] *Id.* at 102.

[189] *Id.* at 104.

[190] *See id.* at 105-106.

[191] Metzger Tr. [# 138] at 39.

[192] *Id.* at 39-40.

[193] *Id.* at 40.

[194] *Id.* at 41-42.

D. *Availability of Adequate Alternatives*

As was the case with Worcester PP, Spring-field PP also presents barriers to communication that are not attributable **[224]** to state action. Plaintiffs are in error when they assert that the buffer zone law is "constitutionally suspect" when applied to a multi-purpose office building.[195] In *Hill v. Colorado*, the Supreme Court found that, "[s]pecial problems that may arise where clinics have particularly wide entrances or are suited within multipurpose office buildings may be worked out as the statute is applied."[196] The buffer zone at issue in *Hill* was a floating buffer zone that limited the ability of protesters to approach people within a fixed radius of a clinic's entrances and exits.[197] The Supreme Court in that case found that the buffer zone created by the Colorado statute was a facially valid time place and manner restriction.[198] The Act at issue in this case creates a fixed buffer zone akin to the one upheld by the Court in *Schenck v. Pro-Choice Network of Western New York*, which applied to a number of

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[195] Trial Tr. [# 150] at 81 (purporting to characterize *Hill*, 530 U.S. 703, 120 S.Ct. 2480).

[196] *Hill v. Colorado*, 530 U.S. 703, 730, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

[197] *Hill* involved a statute making it, "unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...'" *Hill*, 530 U.S. at 707, 120 S.Ct. 2480 (quoting Co-lo. Rev. Stat. § 18-9-122(3) (1999)).

[198] *Hill*, 530 U.S. at 730, 120 S.Ct. 2480.

clinics that were "part of larger hospital complexes."[199] As the Ninth Circuit has observed, "[t]he State does not design clinics with wide entrances or place them in multipurpose office buildings; instead, the only relevant state action would be the application of the statute to such factual settings."[200] The question, therefore, remains simply whether the act as applied at this location leaves open ample alternative means of communication.

The evidence in the record shows that the Act, as it is applied at Springfield PP, leaves open adequate alternative means of communication. Many of the barriers to communication at Springfield PP are due to the fact that the clinic is located in the center of a large parking lot, on private property, and most clinic patrons drive to their appointments. These barriers would exist regardless of whether the Act was in place or not because they are a result of Springfield PP's location on private property, not state action.

Nonetheless, it is apparent that Plaintiffs are able to convey their pro-life message to people entering the clinic and people passing by on Main Street and Wason Avenue. The testimony of Dr. Shea and Ms. Metzger demonstrates that people approaching Springfield PP are able to see protesters' signs and hear their prayers. Protesters are able to stand almost anywhere along the public sidewalk surrounding the medical complex, except for the two clearly marked and posted buffer zones. If clinic patients are receptive to Plaintiffs' message, there is nothing to stop them from leaving clinic

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[199] *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 361, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

[200] *Hoye v. City of Oakland*, 653 F.3d 835, 848-50 (9th Cir. 2011).

property and engaging in conversation or accepting literature or counseling. Simply because Plaintiffs are not able to stand directly next to or in the two clinic driveways that are surrounded by buffer zones does not mean that adequate alternative means of communication do not exist. Indeed, Plaintiffs may engage in any form of communicative activity they desire anywhere else on the public sidewalk. It is clear, therefore, that the Act as applied at [**225**] Springfield PP leaves open adequate alternative means of communication.

IV. ***Conclusion***

For the foregoing reasons, this court finds that the Act as applied to Plaintiffs' activities at the Boston, Worcester, and Springfield Planned Parenthood locations is a constitutionally valid, content neutral time, place, and manner restriction. Given this court and the First Circuit's prior rulings that found the Act to be narrowly tailored to serve a significant and legitimate governmental interest, and with respect to the evidence presented in this case, it is clear that the Act as applied is a constitutionally valid regulation of the time, place and manner of speech. Judgment shall enter in Defendants' favor on all counts.

IT IS SO ORDERED.

ORDER

For the reasons set forth in the accompanying memorandum [# 153], judgment is entered for Defendants on all remaining counts in Plaintiffs' as-applied challenge. This case is, therefore, CLOSED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY A. SMITH, CARMEL FARRELL, AND ERIC CADIN,

Plaintiffs,

v.

MARTHA COAKLEY, IN HER CAPACITY AS ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,

Defendant.

No. 08-10066-JLT
Dec. 29, 2010

[759 F. Supp.2d 133]

MEMORANDUM

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* * *

[135]

TAURO, District Judge.

I. INTRODUCTION

This case concerns a recently revised Massachusetts statute, Massachusetts General Laws Chapter 266, § 120E1/2 ("Act"), which establishes a thirty-five-foot fixed buffer zone around driveways and entrances

of reproductive health care facilities ("RHCFs"). Presently at issue are Plaintiffs' *Motion to Permit Arguments as to Facial Invalidity* [# 95], Defendant's *Motion for Judgment on the Pleadings on the As–Applied Claims in Counts Two Through Eight* [# 99], and Plaintiffs' *Motion for Leave to File Amended Complaint* [# 94].

Plaintiffs' *Motion to Permit Arguments as to Facial Invalidity* is DENIED; Defendant's *Motion for Judgment on the Pleadings* is ALLOWED; and Plaintiffs' *Motion for Leave to File Amended Complaint* is ALLOWED IN PART and DENIED IN PART.

II. Background[201]

A. The Parties

Plaintiffs Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell, and Eric Cadin are Massachusetts residents who regularly engage in pro-life counseling outside RHCFs. Defendant Attorney General Martha Coakley is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts. As such, Defendant bears responsibility for enforcing the Act. She is sued in her official capacity only.[202]

B. [136]Procedural History

On January 16, 2008, Plaintiffs filed the *Complaint*, which advanced eight counts under 42 U.S.C. § 1983: (1) Free Speech—Time, Place, and Manner; (2) Free

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[201] This court assumes familiarity with its previous decision in this case, *McCullen v. Coakley ("McCullen I")*, 573 F.Supp.2d 382 (D.Mass. 2008), but nonetheless presents a condensed background.

[202] *See* Compl., 3 [# 1].

Speech—Substantial Overbreadth; (3) Free Speech—Prior Restraint; (4) "Free Speech—Free Association—Free Exercise Hybrid"; (5) Free Speech—Viewpoint Discrimination; (6) Due Process—Vagueness; (7) Due Process—Liberty Interest; and (8) Equal Protection.[203]

After a Status Conference held on April 23, 2008, and without objection from the Parties, this court ordered that the matter proceed on the merits in two stages: (1) a Bench Trial on Plaintiffs' facial challenge; and (2) a Bench Trial on Plaintiffs' as-applied challenge.[204]

On May 28, 2008, this court held the first Bench Trial, on Plaintiffs' facial challenge.[205] In an August 22, 2008 decision, this court held that the Act survived all three facial challenge standards.[206] The Court of Appeals for the First Circuit held a de novo review and affirmed this court's decision,[207] and the Supreme Court denied Plaintiffs' petition for certiorari at this stage of the case.[208]

On September 17, 2010, Plaintiffs filed a *Motion for Leave to File Amended Complaint* [# 94] and a *Motion to Permit Arguments as to Facial Invalidity* [# 95]. On

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[203] Compl., 13–22 [# 1].

[204] Order [# 34].

[205] *McCullen I*, 573 F.Supp.2d at 386.

[206] *Id.* at 425. This court held that the Act was constitutional under the First Amendment, the Equal Protection Clause, and the Due Process Clause. *Id.*

[207] *McCullen v. Coakley ("McCullen II")*, 571 F.3d 167 (1st Cir.2009).

[208] *McCullen v. Coakley ("McCullen III")*, —— U.S. ——, 130 S.Ct. 1881, 176 L.Ed.2d 362 (2010).

October 7, 2010, Defendant filed a *Motion for Judgment on the Pleadings on the As–Applied Claims in Counts Two Through Eight* [# 99]. On December 2, 2010, this court heard oral arguments on all three Motions and took them under advisement.

III. Discussion

A. Plaintiffs' Motion to Permit Arguments as to Facial Invalidity

Despite this court's prior decision dismissing Plaintiffs' facial challenges, and the First Circuit's affirmation of this court's decision, Plaintiffs seek to "continue arguing for facial invalidation."[209]

1. Legal Standard

The "law of the case" doctrine generally requires that "a decision of an appellate tribunal on a particular issue ... governs the issue during all subsequent stages of the litigation ... and thereafter on any further appeal."[210] The law of the case doctrine has two components: first, the "mandate rule," which "forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage in the case"; and second, the general rule that "unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation."

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[209] Mot. Permit Args. Facial Invalidity, 2 [# 95].

[210] *United States v. Rivera–Martinez*, 931 F.2d 148, 150 (1st Cir.1991) (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)).

[137][211] The law of the case doctrine applies to an appellate court's ruling both if the case is on appeal of a final judgment or if the appeal is interlocutory.[212]

Only three, very narrow exceptions to the law of the case doctrine exist. For a court to revisit an issue,

> the proponent of reopening an already decided matter must accomplish one of three things: [1] "show that controlling legal authority has changed dramatically; [2] proffer significant new evidence, not earlier obtainable in the exercise of due diligence; or [3] convince the court that a blatant error in the prior decision will, if uncorrected, result in a serious injustice."[213]

2. Analysis

Here, Plaintiffs contend that the law of the case doctrine does not apply for two reasons. First, Plaintiffs contend that the first exception to the law of the case doctrine applies because controlling legal authority has changed dramatically. Second, Plaintiffs

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[211] *Municipality of San Juan v. Rullan*, 318 F.3d 26, 29 (1st Cir. 2003) (quoting *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002)); *see also Rivera–Martinez*, 931 F.2d at 150 ("[T]he decision of the appellate court establishes the law of the case and it must be followed by the trial court ...." (quoting 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice para. 0.404[1] (2d ed. 1991))).

[212] *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 72 F.3d 190, 197–98 (1st Cir. 1995) (citing *Elias v. Ford Motor Co.*, 734 F.2d 463 (1st Cir. 1984)).

[213] *United States v. Vigneau*, 337 F.3d 62, 68 (1st Cir. 2003) (quoting *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993); citing *Rivera-Martinez*, 931 F.2d at 151).

contend that the second exception, the existence of significant new evidence, also applies.

a. First Exception: Change in Controlling Legal Authority

To support their first argument, that controlling legal authority has changed dramatically, Plaintiffs cite two recent Supreme Court cases: *Citizens United v. Federal Election Commission*[214] and *United States v. Stevens*.[215]

i. *Citizens United v. Federal Election Commission*

In *Citizens United*, the Supreme Court struck down a federal campaign statute that banned independent expenditures by corporations.[216] The Supreme Court explained that, pursuant to the First Amendment, corporations may not be barred from engaging in political speech simply because they are not natural persons.[217] Plaintiffs cite *Citizens United* for the proposition that "legislative [speaker] distinctions are not permitted by the First Amendment."[218] That is, according to Plaintiffs, the Supreme Court's decision in *Citizens United* is "directly contrary to the standards applied by the First Circuit [in *McCullen II*] in per-

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[214] — U.S. ——, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

[215] — U.S. ——, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

[216] *Citizens United*, 130 S.Ct. at 886.

[217] *Id.* at 900 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 780 n. 16, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)).

[218] Mot. Permit Args. Facial Invalidity, 2 [# 95] (citing *Citizens United*, 130 S.Ct. at 898); *see* Mot. Permit Args. Facial Invalidity, 9–12 [# 95].

mitting speaker distinctions so long as [the court] can 'glean legitimate reasons'" for the existence of the speaker distinction.[219] Plaintiffs [138] argue that Citizens United is relevant here because the Act "specifically exempts 'employees or agents of [abortion clinics] acting within the scope of their employment,'" thereby creating a speaker distinction.[220]

Plaintiffs' argument with regard to *Citizens United* is unpersuasive. Indeed, this court holds that *Citizens United* is simply not relevant here. Plaintiffs' construal of the holding in *Citizens United* is misleading.[221] Plaintiffs are correct that the Supreme Court reiterated the general prohibition on speaker distinctions in *Citizens United*. But that case concerned an absolute ban on speech rather than a time, place, or manner restriction.[222] This court has previously explained, and the First Circuit has affirmed, that the Act creates a time, place, or manner restriction and is thus not an absolute ban on speech.[223] Further, as the First Circuit explained in this case, the Supreme Court "has left no doubt but that time-place-manner restrictions should

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[219] Mot. Permit Args. Facial Invalidity, 2–3 [# 95] (quoting *McCullen II*, 571 F.3d at 177).

[220] *Id.* (quoting *McCullen I*, 573 F.Supp.2d at 399).

[221] *See* Mot. Permit Args. Facial Invalidity, 2, 9-12 [# 95].

[222] *See Citizens United*, 130 S.Ct. at 898 (explaining that the law at issue is "a ban on speech" and that "restrictions distinguishing among different speakers, allowing speech by some but not others" are prohibited).

[223] *McCullen II*, 571 F.3d at 181 ("[T]his case involves a time, place, and manner restriction."); *McCullen I*, 573 F.Supp.2d at 408 ("On its face, the 2007 Act is a content-neutral time, place and manner restriction....").

not be analyzed in the same way as direct bans on speech."[224]

Moreover, the principle that the legislature may not bar some speakers from speaking while allowing others to speak is not a new principle.[225] The principle certainly is not inconsistent with prior First Circuit law. Indeed, Plaintiffs argue that "prior First Circuit law had permitted speaker distinctions when supported by a legitimate reason"[226] but that *Citizens United* renders such prior First Circuit case law outdated.[227] Specifically, Plaintiffs challenge Defendant's reliance on *McGuire v. Reilly* (*McGuire I*),[228] a 2001 First Circuit case that Plaintiffs contend has been abrogated by *Citizens United*.[229]

Plaintiffs' position is unconvincing. *McGuire I* is still good law. In *McGuire I*, the First Circuit relied on the test for content-neutrality that was first established in *Ward v. Rock Against Racism*.[230] In *Chris-*

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[224] *McCullen II*, 571 F.3d at 181 (citing *Hill v. Colorado*, 530 U.S. 703, 731, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)).

[225] *See, e.g., Bellotti*, 435 U.S. at 784–85, 98 S.Ct. 1407 (citing *Police Dep't v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)).

[226] Reply Br. Supp. Mot. Permit Args. Facial Invalidity, 2 [# 102] (citing *McGuire v. Reilly (McGuire I)*, 260 F.3d 36, 45–47 (1st Cir.2001)).

[227] *Id.* at 2–3.

[228] 260 F.3d 36 (1st Cir.2001).

[229] Reply Br. Supp. Mot. Permit Args. Facial Invalidity, 2–3 [# 102].

[230] 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *see McGuire I*, 260 F.3d at 43.

tian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez,[231] a decision dated five months after *Citizens United*, the Supreme Court confirmed the survival of the *Ward* test. The Supreme Court, quoting *Ward*, explained that "'a regulation that serves purposes unrelated to the content **[139]** of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'"[232]

Citizens United thus is not controlling legal authority in this case and does not operate to exempt Plaintiffs from the law of the case doctrine.[233]

ii. *United States v. Stevens*

Plaintiffs next argue that the Supreme Court's decision in *United States v. Stevens* constitutes a change in controlling legal authority such that the law of the case doctrine does not apply. *Stevens* struck down a federal statute that prohibited the creation, sale, or possession of portrayals of animal cruelty, holding that the statute was substantially overbroad and thus facially unconstitutional.[234]

Plaintiffs cite *Stevens* for the proposition that "a strained interpretation of a law offered by the enforcement authorities cannot save an invalid law, and that the offering of such an interpretation in fact sug-

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[231] ___ U.S. ___, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).

[232] *Id.* at 2994 (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994)).

[233] *See Vigneau*, 337 F.3d at 68 (quoting *Bell*, 988 F.2d at 251; citing *Rivera-Martinez*, 931 F.2d at 151).

[234] *Stevens*, 130 S.Ct. at 1582, 1592.

gests the statute is unconstitutional as written."[235] Plaintiffs argue that Defendant has offered just such a strained interpretation of the Act.[236] Specifically, Plaintiffs contrast, on the one hand, the fact that the Act entirely exempts from the statute anyone sent by an abortion clinic into the buffer zone with, on the other hand, the contents of a guidance letter that Defendant sent to law enforcement personnel.[237] Defendant's letter read, in pertinent part: "[T]he third exemption [of the Act] ... does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone."[238] According to Plaintiffs, the Attorney General has adopted—and instructed law enforcement officers to apply—a "construction" of the Act that is wholly unrelated to its actual text.... The Attorney General's attempt to "interpret" this language to say that, in fact, speakers from abortion clinics are criminally prohibited from discussing abortion in the zone has no basis in the statute.[239]

Plaintiffs' attempt to apply *Stevens* to this case is itself strained. In *Stevens*, the government tried unsuccessfully "to salvage an otherwise unconstitutional law with an official's interpretation."[240] Here, in contrast, the Act has already been held to be facially valid.

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[235] Mot. Permit Args. Facial Invalidity, 3 [# 95] (citing *Stevens*, 130 S.Ct. at 1591).

[236] Mot. Permit Args. Facial Invalidity, 14 [# 95].

[237] Mot. Permit Args. Facial Invalidity, 14 [# 95].

[238] *McCullen I*, 573 F.Supp.2d at 400 (quoting Ex. 26 Trial R. Pls.' Facial Challenge, 2 [# 63]).

[239] Mot. Permit Args. Facial Invalidity, 14 [# 95].

[240] Mot. Permit Args. Facial Invalidity, 13 [# 95].

This court already rejected Plaintiffs' substantive argument regarding the Act's employee exemption.[241] The First Circuit, in affirming this court's decision, was clear: "[A] state official's interpretation of a statute, even if generally **[140]** authoritative, cannot render an otherwise constitutional statute vulnerable to a facial challenge."[242] Because this court and the First Circuit have already held the Act facially constitutional, Defendant's interpretation of the Act is irrelevant.[243]

Because *Stevens* is not relevant, it is unnecessary to reach the question of whether *Stevens* "changed dramatically" "controlling legal authority."[244] Nevertheless, this court observes that the Supreme Court in *Stevens* applied the same test for overbreadth that this court and the First Circuit did in *McCullen I* and *McCullen II*.[245] This uniformity weakens considerably

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[241] *McCullen I*, 573 F.Supp.2d at 407–08 ("On its face, the statute does not permit advocacy of any kind in the zone.").

[242] *McCullen II*, 571 F.3d at 178 (citing *McGuire v. Reilly (McGuire II)*, 386 F.3d 45, 58 (1st Cir.2004)).

[243] *See id.*

[244] *Vigneau*, 337 F.3d at 68 (quoting *Bell*, 988 F.2d at 251; citing *Rivera–Martinez*, 931 F.2d at 151).

[245] *See Stevens*, 130 S.Ct. at 1587 ("[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008))); *McCullen II*, 571 F.3d at 182 ("[A] court may overturn a law as overbroad only if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (quoting *Wash. State Grange*, 552 U.S. at 449 n. 6, 128 S.Ct. 1184)); *McCullen I*, 573 F.Supp.2d at 401, 417 (citing *Wash. State Grange*, 552 U.S. at 449 n. 6, 128 S.Ct. 1184).

Plaintiffs' contention that *Stevens* constitutes dramatically changed controlling legal authority.

For the foregoing reasons, Plaintiffs have not met their burden of showing that "controlling legal authority has changed dramatically," and thus they have failed to show that they meet the first exception to the law of the case doctrine.[246]

b. Second Exception: Significant New Evidence

Plaintiffs next argue that they can "proffer significant new evidence, not earlier obtainable in the exercise of due diligence"[247] such that the second exception to the law of the case doctrine applies.[248] Plaintiffs argue that the prior opinions of this court and the First Circuit were based on a limited record, a record that "was largely based on uncross-examined affidavits, and was compiled without the benefit of live testimony or a discovery period."[249] Plaintiffs seek leave to "argue that the evidence developed during discovery requires reconsideration of facial validity."[250]

Plaintiffs' argument with regard to the second exception to the law of the case doctrine also fails, for at least two reasons. First, Plaintiffs have not actually proffered any new evidence, let alone "significant new

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[246] *See Vigneau*, 337 F.3d at 68 (quoting *Bell*, 988 F.2d at 251; citing *Rivera-Martinez*, 931 F.2d at 151).

[247] *Id.*

[248] *See* Mot. Permit Args. Facial Invalidity, 3–4, 16–17 [# 95].

[249] Mot. Permit Args. Facial Invalidity, 17 [# 95].

[250] Mot. Permit Args. Facial Invalidity, 17 [# 95].

evidence."[251] Second, Plaintiffs have not shown, as they must under the second exception to the law of the case doctrine, that any new evidence was "not earlier obtainable in the exercise of due diligence."[252]

[141] Moreover, Plaintiffs did not object in April 2008 to this court's decision to bifurcate the case into two trials. Plaintiffs may not have two bites at the apple.[253]

As any one of these reasons is sufficient to defeat Plaintiffs' second argument, Plaintiffs cannot overcome the law of the case doctrine by relying on the doctrine's second exception.

c. *Third Exception: Serious Injustice*

Plaintiffs have not properly raised the issue of the third exception to the law of the case doctrine. Indeed, Plaintiffs' *Motion* notes only that a third exception to the law of the case doctrine exists and then states in a footnote: "As the Supreme Court has recognized, '[u]nder the law of the case doctrine, as most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly

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[251] *Vigneau*, 337 F.3d at 68 (quoting Bell, 988 F.2d at 251; citing *Rivera–Martinez*, 931 F.2d at 151). Additionally, Plaintiffs have not demonstrated that any new evidence would be "significant" to their facial challenge. *Id.*

[252] *Id.*

[253] *See Kramer v. Gates*, 481 F.3d 788, 792 (D.C.Cir.2007) ("Rule 60(b)(6) ... may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.' " (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C.Cir.1980))).

erroneous and would work a manifest injustice.'"[254] This footnote falls within the "Legal Standard" section of Plaintiffs' *Motion*, rather than under their "Argument" section.[255] Plaintiffs' "Argument" section does not refer at all to this exception to the law of the case doctrine.[256]

Because Plaintiffs fail to raise this argument, it is waived.[257] This court is unconvinced "that a blatant error in the prior decision[s]" exists, let alone any error that "if uncorrected, [would] result in a serious injustice."[258]

For all of the foregoing reasons, this court determines that the law of the case doctrine applies and that no exception to that doctrine applies. For these reasons, Plaintiffs' *Motion to Permit Arguments as to Facial Invalidity* is DENIED.

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[254] Mot. Permit Args. Facial Invalidity, 5 & n. 1 [# 95] (quoting *Arizona v. California*, 460 U.S. at 618, 103 S.Ct. 1382). The foot-note continues: "Further, the Supreme Court clarified that the law of the case doctrine 'directs a court's discretion, it does not limit the tribunal's power.'" *Id.* at 5 n. 1.

[255] *See* Mot. Permit Args. Facial Invalidity, 5 & n. 1 [# 95].

[256] *See* Mot. Permit Args. Facial Invalidity, 8–17 [# 95].

[257] *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n. 17 (1st Cir.1999) ("We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived." (citing *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 36 (1st Cir.1994); *Rumford Pharmacy, Inc. v. City of East Providence*, 970 F.2d 996, 1000 n. 9 (1st Cir.1992); *Barrett v. United States*, 965 F.2d 1184, 1194 n. 19 (1st Cir.1992))); *Gill v. United States*, 2009 WL 3152892, at 4 n. 1, 2009 U.S. Dist. LEXIS 88159, at 11 n. 1 (D.Mass.2009) (quoting *Natsios*, 181 F.3d at 61 n. 17).

[258] *Vigneau*, 337 F.3d at 68 (quoting *Bell*, 988 F.2d at 251; citing *Rivera–Martinez*, 931 F.2d at 151).

B. *Defendant's Motion for Judgment on the Pleadings on the As-Applied Claims in Counts Two Through Eight*

Pursuant to Federal Rule of Civil Procedure 12(c), Defendant moves for judgment on the pleadings with regard to the as-applied claims in Counts Two through Eight.[259]

1. *Count Two: Free Speech—Substantial Overbreadth*

Because this court has already decided Plaintiffs' facial claim, Plaintiffs' remaining **[142]** claim in Count Two is an "as applied" claim for substantial overbreadth.

Although the First Circuit has not spoken directly on this point, then-Judge Sotomayor has explained that "[a]ll overbreadth challenges are facial challenges, because an overbreadth challenge by its nature assumes that the measure is constitutional as applied to the party before the court."[260] This court is mindful, however, of an apparent circuit split on this issue. Plaintiffs cite *Turchick v. United States*,[261] an Eighth Circuit case from 1977, to support their as-applied overbreadth challenge.[262] *Turchick* contains the following footnote:

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[259] Def.'s Mot. J. Pleadings As–Applied Claims Counts Two Through Eight [# 99].

[260] *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir.2006) (Sotomayor, J.).

[261] 561 F.2d 719 (8th Cir.1977).

[262] Pls.' Opp'n Defs.' Mot. J. Pleadings As–Applied Claims Counts Two Through Eight & Pls.' Reply Supp. Mot. Amend, 11 [# 109] [hereinafter Pls.' Opp'n] (citing *Turchick*, 561 F.2d at 721 n. 3).

> 'Facial' overbreadth analysis should be distinguished from overbreadth 'as-applied' to a particular claimant. The latter involves a judgment as to the constitutionality of a challenged statute based on the harm caused to the litigating party. The 'as-applied' method vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute only to the extent of the impermissible application. 'Facial' review proceeds without regard to the constitutional status of the litigant's conduct. Under this approach, a statute prohibiting substantial activity protected by the First Amendment is voided entirely.[263]

It appears to this court that while an over-breadth challenge may *contain* an as-applied challenge, it may not consist *solely* of an as-applied challenge. Although the Supreme Court has not addressed this exact question, the Court has explained that "the overbreadth doctrine enables litigants 'to challenge a statute, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"[264] An overbreadth challenge, therefore, always contains a facial component.

Demonstrative of this point, Plaintiffs' explanation of what remains of their overbreadth challenge appears

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[263] *Turchick*, 561 F.2d at 721 n. 3 (citing Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 844–45 (1970)).

[264] *Hill v. Colorado*, 530 U.S. 703, 731–32, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

to require a facial component of the challenge. Plaintiffs claim that the Act is overbroad as applied because it "'sweeps within its ambit a substantial amount of protected speech'"[265] and because it "burdens more speech than necessary to achieve any legitimate state interest."[266] Plaintiffs do not explain how these claims are as-applied claims rather than facial claims, other than asserting that "[t]hese claims are not limited to asserting the rights of third parties."[267] Simply asserting that a law is [143] overbroad as applied to Plaintiffs is not sufficient to persuade this court to depart from the Second Circuit's clear direction on the overbreadth doctrine.

Because this court and the First Circuit have already held the Act facially constitutional, therefore, Plaintiffs may not challenge the Act as overbroad as applied.

2. *Count Three: Free Speech—Prior Restraint*

Count Three challenges the Act as a prior restraint.[268] This court has already held that as a matter

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[265] Pls.' Opp'n, 12 [# 109] (quoting Pls.' Mot. Leave File Am. Compl., Ex. A ¶ 119 [# 94]).

[266] Pls.' Opp'n, 12 [# 109] (citing Pls.' Mot. Leave File Am. Compl., Ex. A ¶ 120 [# 94]).

[267] Pls.' Opp'n, 12 [# 109] (citing Pls.' Mot. Leave File Am. Compl., Ex. A ¶ 123 [# 94]); *see also id.* at 12–13 ("[T]hese as-applied claims were included in the original complaint." (citing Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief ¶¶ 88, 89, 91 [# 1])).

[268] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief, 16 [# 1].

of law, the Act is a time, place, or manner restriction and not a prior restraint.[269]

Plaintiffs are correct that "Plaintiffs will still be free to argue that the time, place, and manner test is not satisfied in that ample alternative channels of communication do not exist,"[270] that is, that the Act is an unconstitutional time, place, or manner restriction as it is applied. But the Act has already been adjudicated to be, on its face, a valid time, place, or manner restriction, and thus cannot also be a prior restraint. As this court has already pointed out, "'[t]he Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner restrictions as prior restraints.'"[271] Likewise, in affirming this court's decision, the First Circuit explained, "our determination that the 2007 Act is a valid time-place-manner restriction effectively forecloses the plaintiffs' resort to case law involving prior restraints."[272]

For these reasons, Plaintiffs may not challenge the Act as a prior restraint as applied.

3. *Count Four: "Free Exercise Hybrid"*

In Count Four, Plaintiffs bring a "free exercise hybrid" challenge to the Act.[273] With regard to Plaintiffs'

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[269] *McCullen I*, 573 F.Supp.2d at 417; *see McCullen II*, 571 F.3d at 183–84.

[270] Pls.' Opp'n, 15 [# 109].

[271] *McCullen I*, 573 F.Supp.2d at 417 (quoting *Bl(a)ck Tea Soc'y v. City of Bos.*, 378 F.3d 8, 12 (1st Cir.2004)).

[272] *McCullen II*, 571 F.3d at 184 (citing Bl(a)ck Tea Soc'y, 378 F.3d at 12).

[273] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief, 17 [# 1].

freedom of speech claim, this court has already determined, both in *McCullen I* and in this Memorandum, "that the Act is a lawful, content-neutral time, place and manner restriction; is not overbroad; and does not constitute a prior restraint."[274] For that reason, Plaintiffs cannot challenge the Act as an as-applied violation of their freedom of speech under Count Four.

Additionally, Plaintiffs may not now argue that the Act constitutes an as-applied violation of their rights under the Free Exercise Clause. As this court explained when it rejected Plaintiffs' facial claim in Count Four, a law of "'neutral and ... general applicability' ... 'need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'"[275]

Plaintiffs thus cannot now argue Count Four as an as-applied claim.

4. *Counts Five and Eight: Free Speech—Viewpoint Discrimination and Equal Protection*

In Counts Five and Eight, Plaintiffs allege viewpoint discrimination and a violation [144] of Equal Protection.[276] Unlike some of Plaintiffs' other as-applied claims, it is theoretically possible for Plaintiffs to press Counts Five and Eight on an as-applied basis. Plaintiffs have not alleged sufficient facts, however, that rise

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[274] *McCullen I*, 573 F.Supp.2d at 418.

[275] *Id.* (quoting *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir.2001)).

[276] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief, 18, 21 [# 1].

to the level of viewpoint discrimination or a violation of Equal Protection.

To press as-applied claims under Counts Five or Eight, Plaintiffs would have had to allege that "enforcement of the statute amounted to viewpoint discrimination" or a violation of Equal Protection.[277] For example, they would have had to allege that police knowingly let clinic employees engage in pro-choice advocacy within a buffer zone.[278] It is not enough, therefore, to allege "opposition from pro-choice advocates who surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature"[279] without also alleging that the police "turned a blind eye toward pro-abortion speech while not turning a blind eye to possible transgressions by plaintiffs."[280]

Additionally, Plaintiffs argue that their allegations concerning Defendant's interpretation of the Act are sufficient to constitute as-applied claims under Counts Five and Eight. *See* Pls.' Opp'n, 18 [# 109]. As explained below, however, Plaintiffs are not permitted to amend their Complaint to include such an argument. *See infra* Part C.

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[277] *McGuire II*, 386 F.3d at 64.

[278] *See id.* at 65 ("[T]here is no evidence that the police have enforced this statute in anything other than an evenhanded way....").

[279] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief ¶ 26 [# 1].

[280] *McGuire II*, 386 F.3d at 65. Plaintiffs' argument that *McGuire II* is inapplicable is unavailing. *See supra* notes 28–32 and accompanying text.

Plaintiffs also argue that there is a higher burden on the government at the as-applied stage than the facial stage to show that the law is constitutional.[281] This argument fails because this court holds here that Plaintiffs have not plead sufficient facts to support an as-applied claim. That is, the discovery that Plaintiffs wishes to conduct cannot cure insufficient pleadings.

5. *Count Six: Due Process—Vagueness*

Count Six challenges the Act for vagueness.[282] This court and the First Circuit have held that the Act is not vague on its face.[283]

The Supreme Court has recently explained that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[284] Because Plaintiffs have conceded that the Act applies to them,[285] they cannot argue that the Act is vague as applied.[286]

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[281] *See* Pls.' Opp'n, 17–18 [# 109].

[282] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief, 19 [# 1].

[283] *McCullen II*, 571 F.3d at 183; *McCullen I*, 573 F.Supp.2d at 422.

[284] *Holder v. Humanitarian Law Project*, — U.S. ——, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

[285] *See* Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief ¶¶ 42–48, 56–58 [# 1].

[286] *See* Holder, 130 S.Ct. at 2719.

6. *Count Seven: Due Process—Liberty Interest*

Count Seven challenges the Act as a violation of Plaintiffs' liberty interest, what [145] Plaintiffs call the "freedom to loiter."[287] This court held that the Act does not violate any of Plaintiffs' Due Process rights.[288] As the law of the case, this ruling terminates Plaintiffs' entire claim under Count Seven.

7. *Count One: Free Speech—Time, Place, and Manner*

Defendant does not seek judgment on Count One.[289] Rather, with regard to Count One, Defendant seeks only a clarification that all that remains to be tried is the as-applied portion of the claim.[290] This court agrees with Defendant that such a clarification is appropriate. Given this court's ruling on Counts 2 through 8, this court agrees that "all that remains to be tried is whether the statute as applied at the clinics specified in the complaint leaves open adequate alternative channels of communication."[291]

For the foregoing reasons, Defendant's *Motion* is ALLOWED.

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[287] Compl. Civil Rights Violations, Declaratory J., & Injunctive Relief, 20–21 [# 1].

[288] *McCullen I*, 573 F.Supp.2d at 424–25.

[289] *See* Def.'s Mot. J. Pleadings As–Applied Claims Counts Two Through Eight, 1 [# 99].

[290] *See* Def.'s Mot. J. Pleadings As–Applied Claims Counts Two Through Eight, 1 [# 99].

[291] Def.'s Mot. J. Pleadings As–Applied Claims Counts Two Through Eight, 1 [# 99].

C. Plaintiffs' Motion for Leave to File Amended Complaint

Plaintiffs seek to amend their *Complaint.* The amended complaint would do three things:

> First, the amended complaint [would] challenge the buffer zone not only in Brookline and Boston (as in the original complaint) but also in Worcester and Springfield, adding five additional plaintiffs who speak at the new locations. Second, the amended complaint [would] add the relevant district attorneys for all four locations as defendants. Third, the amended complaint [would] specifically plead[ ] that [Defendant's] "interpretation" of the Act—which has been communicated to and allegedly implemented by law enforcement—is itself unconstitutional and renders the [A]ct unconstitutional.[292]

> Defendant partially opposes this Motion. Defendant has no objection to the amendment of the complaint to broaden the geographic scope of Count I so that it will include claims that the Act as applied does not leave open adequate channels of communication at the clinics in Boston, Brookline, Springfield, and Worcester. Nor does she object to the addition of five plaintiffs who will make allegations with respect to the Springfield or Worcester clinics. Finally, she does not object to the addition of

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[292] Pls.' Mot. Leave File Am. Compl., 2 [# 94].

> the four District Attorneys as defendants in their official capacit[ies]....[293]

Because this court is not allowing Plaintiffs to re-argue the facial validity of the Act, Plaintiffs' *Motion for Leave to File Amended Complaint* is ALLOWED IN PART and DENIED IN PART. It is ALLOWED to the extent that it seeks to add additional abortion clinics, plaintiffs, and defendants for its as-applied claim in Count One. It is DENIED to the extent that it seeks to plead that Defendant's interpretation of the Act is "unconstitutional and renders the [A]ct unconstitutional." **[146]**[294] It is also DENIED to the extent that Plaintiffs seek to bolster their pleadings in any count other than the as-applied portion of Count One.

Further, Plaintiffs are ordered to re-file an amended complaint that comports with these directions. Plaintiffs shall file such amended complaint within sixty days, by February 27, 2011.

IV. Conclusion

For the foregoing reasons, Plaintiffs' *Motion to Permit Arguments as to Facial Invalidity* [# 95] is DENIED. Defendant's *Motion for Judgment on the Pleadings on the As–Applied Claims in Counts Two Through Eight* [# 99] is ALLOWED. Plaintiffs' *Motion for Leave to File Amended Complaint* [# 94] is ALLOWED IN PART and DENIED IN PART. To the extent that Plaintiffs seek to plead that Defendant's interpretation of the Act is unconstitutional, the *Motion* is DENIED. To the extent that Plaintiffs seek to

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[293] Partial Opp'n Pls.' Mot. File Am. Compl. & Mem. Supp. Defs.' Mot. J. Pleadings As–Applied Claims Counts Two Through Eight, 2 [# 100].

[294] FN94. Pls.' Mot. Leave File Am. Compl., 2 [# 94].

add additional abortion clinics, plaintiffs, and defendants for its as-applied claim in Count One, the *Motion* is ALLOWED.

AN ORDER HAS ISSUED.

ORDER

For the reasons set forth in the accompanying memorandum, this court hereby orders that:

1. Plaintiffs' *Motion to Permit Arguments as to Facial Invalidity* [# 95] is DENIED.

2. Defendant's *Motion for Judgment on the Pleadings on the As–Applied Claims in Counts Two Through Eight* [# 99] is ALLOWED.

3. Plaintiffs' *Motion for Leave to File Amended Complaint* [# 94] is ALLOWED IN PART and DENIED IN PART. It is ALLOWED to the extent that it seeks to add additional abortion clinics, plaintiffs, and defendants for its as-applied claim in Count One. It is DENIED to the extent that it seeks to plead that Defendant's interpretation of the Act is "unconstitutional and renders the [A]ct unconstitutional."[1] It is also DENIED to the extent that Plaintiffs seek to bolster their pleadings in any count other than the as-applied portion of Count One. Further, Plaintiffs are ordered to re-file an amended complaint that comports with these directions. Plaintiffs shall file the amended complaint by February 27, 2011.

IT IS SO ORDERED.

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[1] Pls.' Mot. Leave File Am. Compl., 2 [# 94].

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-2310

ELEANOR MCCULLEN ET AL.,
Plaintiffs, Appellants,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee.

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Joseph L. Tauro, *U.S. District Judge*]

July 8, 2009
[571 F.3d 167]

Before Howard, Selya and Hansen,* *Circuit Judges.*

SELYA, *Circuit Judge.* For more than three decades, those who advocate for a woman's right to choose and those who advocate for the right to life (based on a belief that life begins at the moment of conception) have struggled for advantage in the marketplace of ideas. A series of pitched battles, forming a part of this struggle, has been waged at freestanding

* Of the Eighth Circuit, sitting by designation.

abortion clinics, where protestors and anti-abortion counselors seek to dissuade prospective patients, shame clinic workers, and call attention to what they perceive as the evils of voluntary terminations of pregnancies. In this campaign Massachusetts has been a battleground state.

This appeal arises out of yet another skirmish in this chronicle of discord. In a very real sense, genesis of the appeal dates back to the dawning of the millennium. At that time, the Massachusetts legislature enacted a statute that created a floating buffer zone around the entrances, exits, and driveways of abortion clinics throughout the state.[295]

Given the benefit of hindsight, the legislature revised the law seven years later. The modified version of the statute replaced the floating buffer zone with a 35-foot fixed buffer zone. This appeal involves a multi-pronged facial challenge to the constitutionality of the modified statute.

In a thoughtful and comprehensive opinion, the district court rejected the facial challenge in all its iterations and refused to enjoin enforcement of the new law. *McCullen* v. *Coakley*, 573 F. Supp. 2d 382 (D. Mass. 2008). After careful consideration of the record, the parties' briefs, some helpful friend-of-the-court briefs, and the arguments made orally, we affirm.

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[295] The mechanics of the 2000 Act and the dimensions of the then-current buffer zone are described in earlier opinions of this court. *See McGuire* v. *Reilly*, 386 F.3d 45, 49 (1st Cir. 2004); *McGuire* v. *Reilly*, 260 F.3d 36, 40 (1st Cir. 2001).

V. BACKGROUND

In this case, as in so many cases, the past informs the present. We start there.

By the end of the twentieth century, Massachusetts had experienced repeated incidents involving violence and other unduly aggressive behaviors in the vicinity of reproductive health care facilities (RHCFs). Choosing among a host of possible preventive measures, the legislature took up a bill that proposed creating a fixed 25-foot buffer zone around the entrances, exits, and driveways of RHCFs.

The state senate held a hearing on the bill in April 1999 and received evidence of widespread harassment and intimidation outside RHCFs. Numerous witnesses addressed not only the peculiar vulnerability of women seeking abortion services but also the deleterious effects of overly aggressive demonstrations on both patient and provider safety. The senate concluded that existing laws did not adequately safeguard clinic staff, prospective patients, or members of the public.

As part of its due diligence, the senate asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the constitutionality of the proposed law. The SJC discerned no constitutional impediment. *Opinion of the Justices to the Senate*, 723 N.E.2d 1, 6 (Mass. 2000).

The senate subsequently engrossed a bill intended to enhance public safety in and around RHCFs while maintaining the relatively free flow of traffic. *See* Mass. S. Jour., Feb. 29, 2000. That bill resembled the original senate bill.

Before the house of representatives could act on the senate bill, the United States Supreme Court de-

cided *Hill* v. *Colorado*, in which the Justices upheld, as a content-neutral time, place, and manner restriction, a Colorado statute designed to ameliorate the same panoply of evils through the use of a floating buffer zone. 530 U.S. 703, 707-08 (2000). The Colorado statute synthesized the fixed and floating buffer zone concepts, making it unlawful within a 100-foot fixed zone for any person, in the absence of consent, to "knowingly approach" within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122(3)).

The Massachusetts legislature recognized that *Hill* had shed new light on the legal landscape. Thus, the house tabled the senate bill and repaired to the drawing board. The legislature eventually enacted a law that was loosely patterned on the Colorado statute. *See* An Act Relative to Reproductive Health Care Facilities (2000 Act), S.B. 148, 181st Gen. Ct. (Mass. Aug. 10, 2000). The key component of the 2000 Act was a prohibition against knowingly approaching within six feet of another without consent for certain defined protest-related purposes. Because the prohibition only operated within an 18-foot fixed buffer zone around RHCF entrances, exits, and driveways, it mimicked the Colorado law in combining floating and fixed buffer zone concepts.

A group of Massachusetts residents who wished to protest in front of RHCFs mounted both facial and as-applied challenges to the constitutionality of the new enactment. In successive decisions, we rejected those challenges. *See McGuire* v. *Reilly* (*McGuire I*), 260 F.3d 36, 51 (1st Cir. 2001) (rejecting facial challenges); *McGuire* v. *Reilly* (*McGuire II*), 386 F.3d 45, 65-66 (1st

Cir. 2004) (rejecting renewed facial challenges as well as as-applied challenges).

Over time, legislators became concerned that the statute had failed to achieve its desired goals. In 2007, the legislature held public hearings devoted to the need for rewriting the statute. Testimony (including statements from law enforcement officials and clinic workers) revealed unanticipated difficulties in enforcing the 2000 Act and called into question that Act's efficacy. T The upshot was a decision to reshape the law by, among other things, repudiating the floating buffer zone concept and relying instead on a 35-foot fixed buffer zone.

On November 8, 2007, the legislature enacted the revised law. *See* An Act Relative to Public Safety at Reproductive Health Care Facilities (2007 Act), S.B. 1353, 185th Gen. Ct. (Mass. Nov. 13, 2007). It declares that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to [an RHCF]" within a designated buffer zone. Mass. Gen. Laws ch. 266, § 120E 1/2(b) (2007). The Act describes the new buffer zone as comprising

> a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sidelines of the street in front of such entrance, exit or driveway.

Id. Moreover, the law prohibits all persons from entering or remaining within the buffer zone during ordinary business hours, subject to exceptions for four classes of persons, namely:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Id. Each of these exceptions derives from the 2000 Act. And the 2007 Act, like the 2000 Act, also requires that the buffer zone be clearly marked. *See id.*

On January 25, 2008, the Attorney General sent a letter to an audience that included law enforcement and RHCF personnel. The letter purports to summarize the provisions of the 2007 Act and to furnish "guidance to assist ... in applying the four exemptions." This guidance comprises four paragraphs, set forth verbatim in an appendix to this opinion.

VI. TRAVEL OF THE CASE

On January 16, 2008, plaintiffs-appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell, and Eric Caden, all Massachusetts residents who regularly engage in pro-life counseling outside RHCFs, sued the Attorney General of Massachusetts, in her representative capacity, in the federal district court. Their complaint invoked 42 U.S.C. § 1983, limned a constellation of constitutional claims, and prayed for declaratory and injunctive relief aimed at derailing the 2007 Act. Without objection, the district

court bifurcated the case into facial and as-applied challenges. As to the former, the court consolidated the preliminary injunction hearing with the hearing on the merits, *see* Fed. R. Civ. P. 65(a)(2), and began a bench trial on May 28, 2008.

In due season, the court issued a decision denying relief. *McCullen*, 573 F. Supp. 2d at 425. This interlocutory appeal followed. We have jurisdiction under 28 U.S.C. § 1292(a)(1).

VII. ANALYSIS

We begin our odyssey by outlining the legal standards that apply generally to facial challenges and then proceed to the myriad prongs of the plaintiffs' facial challenge. Because the issues raised on appeal implicate the First Amendment, they engender de novo review. *See Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 508 (1984).

A. General Standards.

Around the edges, the standards that apply in evaluating facial challenges to the constitutionality of statutes are not entirely clear. *See* Richard H. Fallon, Jr., Commentary, *As-applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322-23 (2000). For present purposes, though, the path is reasonably well-lighted.

The Supreme Court recently has stated that a facial challenge will fail if a statute "has a plainly legitimate sweep." *Wash. State Grange* v. *Wash. State Repub. Party*, 128 S. Ct. 1184, 1190 (2008) (citation and internal quotation marks omitted). This is a refinement of its earlier statement that a party mounting a facial challenge "must establish that no set of circumstances ex-

ists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Howsoever worded, this standard imposes a very heavy burden on a party who mounts a facial challenge to a state statute.

The statute at issue here implicates freedom of speech. Justice Cardozo long ago observed that freedom of speech is "the indispensable condition ... of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). But even so precious a freedom must, in particular iterations, be balanced against the government's legitimate interests in protecting public health and safety. *See, e.g., Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre.") (Holmes, J.).

In striking this delicate balance, a court must calibrate the scales differently depending on the nature of the governmental action. *McGuire I*, 260 F.3d at 42. That calibration takes place along a continuum. *See Berner* v. *Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997). At one end of the continuum are laws in which the government attempts to differentiate between divergent views on a singular subject; that is, laws in which the government attempts to "pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook." *Id.* Such viewpoint-based discrimination is highly offensive to the core values of the First Amendment, and courts are wary of such encroachments. *See, e.g., Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Even when a law does not favor one particular viewpoint over another, governmental restrictions on the content of speech may be impermissible. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42

(1994). At this stage of the continuum, a reviewing court must start with a presumption that such a content-based regulation is constitutionally suspect. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992); *Nat'l Amusements, Inc.* v. *Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995). That presumption can be rebutted by a showing that the regulation is both necessary to the furtherance of a compelling state interest and narrowly tailored to the achievement of that interest. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 321 (1988).

Further along the continuum are laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur. Because such time-place-manner restrictions are by definition content-neutral, they tend to burden speech only incidentally; that is, they burden speech for reasons unrelated to either the speaker's viewpoint or the speech's content. *See Turner Broad.*, 512 U.S. at 642. Regulations of this type will be upheld as long as "they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). This more relaxed standard, familiarly known as "intermediate scrutiny," is justified because the fact that a regulation is both content-neutral and viewpoint-neutral helps to ensure that government is not using the regulation as a sub rosa means of interfering in areas to which First Amendment protections pertain. *See Turner Broad.*, 512 U.S. at 642.

B. Content Neutrality.

What we have said to this point leads naturally to the threshold question in this case. The district court found the 2007 Act to be content-neutral. *McCullen*, 573 F. Supp. 2d at 403. The plaintiffs demur. Because the resolution of this dispute will determine the contours of our subsequent analysis (including the appropriate level of scrutiny), we tackle this question first.

Our principal inquiry in this regard, both in speech cases generally and in time-place-manner cases specifically, "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 781. "Thus, a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." *McGuire I*, 260 F.3d at 43; *accord McGuire II*, 386 F.3d at 57.

The lower court, relying mainly on *Hill*, 530 U.S. at 719-20, determined that the 2007 Act was content-neutral because it did not regulate speech—merely the places in which speech might occur. *McCullen*, 573 F. Supp. 2d at 403. Moreover, the law was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech. *Id.*

The plaintiffs resist this characterization. They acknowledge that the statute has a content-neutral patina, but they insist that this patina masks a more sinister reality. They point to several "facts" which, in their estimation, collectively indicate that the legislature's abiding motive was to curb anti-abortion speech. Specifically, the plaintiffs assert that the expanded size of the buffer zone is suspicious; that the zone itself, as re-

configured, contradicts its stated "public safety" goal in that it causes more safety hazards than it abates; that the legislature deliberately drew its evidence from biased sources, in effect listening to only one side of the story; that this court's characterizations of the 2000 Act, *McGuire I*, 260 F.3d at 49, belie the legislators' professed concerns about enforcement of that law; and that the nonexistent "emergency" referenced in the preamble to the 2007 Act is a figment of the legislators' collective imagination (and thus, a cover-up for the legislature's real agenda).

Although a few of the factual components of this broadside are new and others have been refurbished or reworked, the broadside itself is on the order of one that was leveled against the 2000 Act and soundly rebuffed in *McGuire I*. There, we wrote:

> To be sure, the plaintiffs insist that the state's professed concerns about public safety, personal security, and access to medical facilities are mere pretexts for its desire to censor anti-abortion speech. This insistence gets them nowhere. For one thing, their insinuations are unsupported by any record evidence. For another thing, where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech.

Id. at 45. So it is here.

As in *McGuire I*, the plaintiffs' basic complaint is that alleged deficiencies in the factual record compiled by the legislature—gaps, distortions, mischaracteriza-

tions, and the like—compel an inference of pretext. But as in *McGuire I*, our independent review of the record confirms that the legislative factfinding adequately underpins what the legislature wrought. We need not cite book and verse. Although the plaintiffs, ably represented, have done a thorough job of fly-specking the legislative record, their claim of pretext is no more effective than was the counterpart claim advanced in *McGuire I*. Consequently, it is enough to note our wholehearted agreement with the district court that the record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *McCullen*, 573 F. Supp. 2d at 405. In the final analysis, the claim of factual inadequacy amounts to little more than wishful thinking.

We nonetheless consider it wise to embellish two points. First, the fact that we spoke approvingly of the 2000 Act did not serve to freeze the statute in place. The legislature had a right (some might say an obligation) to monitor the statute's operation and to revisit the matter if experience revealed unexpected problems. *See Ward*, 491 U.S. at 800; *Nat'l Amusements*, 43 F.3d at 742.

Second, the test for content neutrality does not require proof that the legislature's response to a perceived problem be the only solution or even the best solution; it simply requires that the evidence support a conclusion that the regulation is in service to a legitimate governmental interest unrelated to expressive content. *McGuire II*, 386 F.3d at 58; *McGuire I*, 260 F.3d at 44. In grading a regulation's efficacy under this test, a reviewing court must grant a significant degree of respect to the legislature's judgment. *See Turner Broad.*, 520 U.S. at 195. Viewed through this deferen-

tial prism, the factfinding that undergirds the 2007 Act easily attains a passing grade.

In a related vein, the plaintiffs maintain that several features of the 2007 Act themselves constitute either content-based or viewpoint-based discrimination. These features include the exception for clinic employees and agents, the statute's alleged under-inclusiveness (*i.e.*, the fact that the legislature did not extend it to other types of free-standing medical clinics), and the Attorney General's guidance letter.

This three-faceted structural argument is not original. Without exception, claims analogous to those that comprise it were addressed in our earlier decisions anent the 2000 Act. *See McGuire II*, 386 F.3d at 56-59; *McGuire I*, 260 F.3d at 44-47. Those decisions render superfluous any exegetic discussion of the current version of the structural argument. For now, it suffices to say that the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference. *See McGuire II*, 386 F.3d at 57; *McGuire I*, 260 F.3d at 44. Here, there is no "more."

To be sure, the plaintiffs strive to distinguish our earlier decisions and add the missing integers to the equation. Only two of these efforts deserve comment.

The argument that the law is content-based due to the exception permitting those persons associated with RHCFs (*e.g.*, clinic workers and patients) but not others to enter the buffer zone was squarely raised and squarely repulsed in *McGuire I*, 260 F.3d at 45-47. The present plaintiffs try to give that argument a new twist. They posit that the very size and nature of a 35-foot fixed buffer zone somehow changes the constitu-

tional calculus and makes this exception less defensible. This is whistling past the graveyard.

The decisive question in a facial challenge is not whether a regulation is necessary to achieve the legislature's stated goal but, rather, whether a court can glean legitimate reasons for its existence. *See id.* at 47. This principle applies to the configuration of the buffer zone selected by the legislature. The size of that zone need only be reasonably related to the attainment of the legislature's goal. That some might think a 25-foot or 30-foot buffer zone sufficient is not the issue.

Here, moreover, differences in the buffer zone's dimensions and other characteristics do not tip the constitutional balance. Regardless of those differences, the exception for persons associated with RHCFs remains reasonably related to the legislature's legitimate public safety objectives. No more is exigible to reject this aspect of the plaintiffs' facial challenge.[296]

Second, the plaintiffs maintain that the Attorney General's interpretive guidance (reprinted in the appendix) demonstrates that the 2007 Act is not content-neutral. In particular, they highlight the passage in the guidance letter in which the Attorney General uses the phrase "abortion and partisan speech." The force of this attack is dissipated by our decision in *McGuire II*, 386 F.3d at 58, in which we explained that a state official's interpretation of a statute, even if generally authoritative, cannot render an otherwise constitutional statute vulnerable to a facial challenge.

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[296] This same reasoning also serves to defeat the plaintiffs' equal protection and viewpoint discrimination claims, each of which focuses on the legislature's decision to limit the reach of the relevant exception to persons associated with RHCFs.

In sum, we find nothing in either the text or the legislative history of the 2007 Act that deprives that statute of content-neutral status. We proceed, therefore, with intermediate scrutiny, recognizing that the constitutionality of the 2007 Act turns on whether it is narrowly tailored and allows sufficient alternative means of communication. *See, e.g., Clark*, 468 U.S. at 293.

C. Narrow Tailoring/Channels of Communication.

A regulation is narrowly tailored if it (i) facilitates a substantial governmental interest that would be less effectively served without the regulation and (ii) accomplishes this end without burdening substantially more speech than necessary. *Ward*, 491 U.S. at 799.

The first element of this two-part definition is not seriously disputed here. The interests ascribed by the legislature to the 2007 Act (enhancing public safety around RHCFs, improving traffic flow, and the like) are the same as those that we deemed both proper and substantial in *McGuire I*, 260 F.3d at 48 (describing those interests as "precisely the sort of interests that justify some incidental burdening of First Amendment rights").

It is the second part of the definition that draws the plaintiffs' fire: they argue that the 2007 Act regulates too much speech. But this argument rests on a misconception; it assumes that, in order to survive intermediate scrutiny, a law (and within a law, a buffer zone) must burden no more speech than is absolutely necessary to accomplish the law's legitimate purpose.

Perscrutation of the plaintiffs' briefs makes it apparent that this misconception arises out of a misreading of the Court's decisions in *Schenck* v. *Pro-Choice*

Network, Inc., 519 U.S. 357 (1997), and *Madsen* v. *Women's Health Center*, 512 U.S. 753 (1994). In each instance, the Court applied a "no greater restriction than necessary" standard to determine the validity of an injunction. *See Schenck*, 519 U.S. at 374; *Madsen*, 512 U.S. at 765. But injunctions (which bind only the parties in a particular case and those in privity with them) are more targeted than statutes (which apply broadly to all concerned). This is a critically important distinction; the Court has made it pellucid that the absence of general applicability subjects injunctions to a stricter standard than legislative enactments. *See Madsen*, 512 U.S. at 764-65; *cf. Ry. Exp. Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.") (Jackson, J., concurring). A law of general application passes muster under narrow tailoring principles as long as it is not substantially broader than necessary to accomplish the legislature's legitimate goal. *See Ward*, 491 U.S. at 799; *see also Madsen*, 512 U.S. at 764.

Ward supplies the measuring stick that we must wield. The 2007 Act is a law of general application. Given that it promotes a substantial public interest, *McGuire I*, 260 F.3d at 48, the decisive question is whether it burdens *substantially* more speech than necessary to serve that purpose. If the answer to that query is in the negative, the law does not offend the First Amendment "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. This means, of course, that "a judge's agreement with the responsible decisionmaker

concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted" are not conditions precedent to upholding a time-place-manner restriction. *Id.*

That conclusion effectively ends this aspect of the matter. Testimony from law enforcement officers and clinic workers attested to the ineffectiveness of the preexisting law. Against that backdrop, the legislature determined, after considerable study, that the state's declared interests would be better served by reconfiguring the buffer zone around RHCFs. The legislature labored to balance First Amendment concerns with public safety concerns, *see McCullen*, 573 F. Supp. 2d at 397-98 (recounting evidence), mulled the advantages and disadvantages of variously configured buffer zones, and decided (reasonably, we think) that a 35-foot fixed buffer zone made sense. Given the deference that is owed to such legislative judgments, *see Turner Broad.*, 520 U.S. at 195, we cannot say that the 2007 Act is substantially broader than necessary.

The fact that the legislature reached a different conclusion seven years earlier (when it preferred a smaller buffer zone that had both floating and fixed components) does not undercut this conclusion. After all, legislative choice is a dynamic process. Simply because a legislature previously has attempted to address a particular problem in one way does not disable it from taking a different approach at a later time. *See, e.g.*, *Ward*, 491 U.S. at 800 (justifying increased regulation based on evidence of inadequacy of municipality's prior attempts to combat noise); *Nat'l Amusements*, 43 F.3d at 742 n.9 (similar); *cf. Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (affirming agency's reversal of position while noting that in exercising legislatively delegated author-

ity agency is free to consider "the wisdom of its policy on a continuing basis"). Experience is often the best teacher, and the incremental nature of the legislature's actions seems more a virtue than a vice. On these facts, the legislature's judgment must be respected. *See Turner Broad.*, 520 U.S. at 195.

Relatedly, the plaintiffs suggest that the 2007 Act is constitutionally infirm because it amounts to a ban on handbilling and interferes with the provision of an eight-to-fifteen-foot "constitutional conversational distance." That suggestion is jejune.

Contrary to the plaintiffs' importunings, the Constitution neither recognizes nor gives special protection to any particular conversational distance. *See, e.g.*, *Schenck*, 519 U.S. at 380 (upholding a fixed 15-foot buffer zone). By the same token, handbilling is not specially protected. *See Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). Time-place-manner regulations routinely make particular forms of expression impracticable without raising constitutional concerns. *See, e.g.*, *Hill*, 530 U.S. at 726-28. As we explained in *Bl(a)ck Tea Society* v. *City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004), there is no constitutional guarantee of any particular form or mode of expression. The correct inquiry is whether, in light of the totality of the circumstances, a time-place-manner regulation burdens substantially more speech than necessary and, concomitantly, whether such a regulation leaves open adequate alternative channels of communication. *See Clark*, 468 U.S. at 293.

This brings us to the question of whether the 2007 Act satisfies the last half of this prescription—the half that deals with alternative channels of communication. To begin, the 2007 Act places no burden at all on the

plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone.

Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

To cinch matters, the size of the zone is not unreasonable. It bears repeating at this point that we are dealing exclusively with a facial challenge to the 2007 Act. Thus, as long as we can envision circumstances in which a 35-foot buffer zone allows adequate alternative means of expression, the challenge must fail. *See Wash. State Grange*, 128 S. Ct. at 1190.

It is easy to envision such a scenario. Indeed, the zone at issue here is slightly smaller than that upheld in *Madsen*, 512 U.S. at 768-70 (validating a 36-foot buffer zone under a standard stricter than that which is applicable here). By like token, the zone at issue here is substantially smaller than the fixed portion of the buffer zone approved in *Hill*, 530 U.S. at 703 (upholding a floating buffer zone within a 100-foot fixed buffer zone). Also instructive is *Burson* v. *Freeman*, 504 U.S. 191 (1992), in which the Court, applying strict scrutiny to a content-based regulation, approved a 100-foot buffer zone for polling places. *Id.* at 211. While there is no particular buffer zone radius that is per se permissible or impermissible—everything depends on context—the radius here is not, on its face, constitutionally deficient.

To say more on the binary question of narrow tailoring and alternative channels of communication would be supererogatory. In the circumstances revealed by the record, the 2007 Act, on its face, is a valid time-place-manner regulation that advances a significant governmental interest without burdening substantially more speech than necessary and leaves open adequate alternative channels of communication. Accordingly, the statute survives intermediate scrutiny.

D. Overbreadth.

First Amendment challenges based on a statute's alleged overbreadth are more readily accommodated than other types of facial challenges. The main difference is that courts will consider overbreadth challenges even though the challenger's own free speech rights are not implicated. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). This leniency results from a judicial "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* The plaintiffs mount such a challenge. They argue that the 2007 Act cannot constitutionally be applied to the wide universe of people who might want to linger in the buffer zone and express their views. They liken this case to *Board of Airport Commissioners* v. *Jews For Jesus*, in which the Supreme Court struck down as overbroad an outright ban on all First Amendment activity within a major international airport. 482 U.S. 569, 577 (1987).

The matter at hand is readily distinguishable from *Jews for Jesus*. That case involved a direct ban on First Amendment activity, whereas this case involves a time, place, and manner restriction. The Court has left no doubt but that time-place-manner restrictions

should not be analyzed in the same way as direct bans on speech. *See Hill*, 530 U.S. at 731.

In all events, the plaintiffs' overbreadth argument is eerily reminiscent of one considered and rejected in *Hill*. There, the challengers asserted that the Colorado statute was overbroad because it applied to all medical clinics, not just to abortion providers. The Court debunked that assertion, stating that "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Id.* at 730-31; *see id.* at 723 (approvingly noting that the statute applies "equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries").

That logic is persuasive here. Although the Massachusetts legislature was plainly moved to enact the statute by the secondary effects of anti-abortion protests, it opted to address the secondary effects of a broader range of activities in the interest of effective enforcement. This decision to widen the statute's coverage is a matter of degree, not a matter of kind. Legislatures are not held to standards of mathematical precision where policy judgments are concerned. *See, e.g.*, *Burson*, 504 U.S. at 210 (describing the question of whether a 100-foot buffer zone could be reduced by 25 feet as not of "constitutional dimension"). Here, the increased degree of the expansion is reasonable, so the expansion is not a matter of constitutional significance. *See Hill*, 530 U.S. at 730-31; *Burson*, 504 U.S. at 210; *see also City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 802 (1984) (explaining that "if the ordinance may be validly applied to [the plaintiffs], it can be validly applied to [a broader range of persons]").

There is, moreover, a paradox that taints the plaintiffs' overbreadth argument. The plaintiffs say, in effect, that the 2007 Act should have been limited to abortion-related speech. Yet the absence of any reference to any particular kind of speech (and, thus, to any particular content or viewpoint) is what makes the statute content-neutral. *See Hill*, 530 U.S. at 723; *Burson*, 504 U.S. at 207. If a failure to distinguish among speakers in itself gave rise to overbreadth problems, legislatures would be forced to choose between passing laws that were not content-neutral or laws that were overbroad. *Hill* pretermits the contention that the First Amendment forces state legislatures to face this sort of Morton's Fork.

We have yet another bridge to cross. At oral argument in this court, the plaintiffs essayed a new and different spin on overbreadth—a perspective that emerged during the panel's questioning. Seizing upon this perspective, the plaintiffs suggested that the Attorney General's guidance letter might be read to criminalize the conduct of anyone who engages in any "partisan speech," whether or not abortion-related, while passing though the buffer zone. This interpretation raises the concern that an individual could be prosecuted merely for passing through the buffer zone en route to a destination outside the zone while, say, wearing a lapel pin advocating the election of a political candidate or a T-shirt exhorting a favorite baseball team.

Though interesting, this argument is untimely. It was not raised either in the district court or in the plaintiffs' briefs on appeal.[297] It is, therefore, waived.

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[297] To be sure, the plaintiffs' general overbreadth argument implicitly attacks the exceptions to the 2007 Act. But avoiding waiver requires more than a hint that a particular theory may be

See United States v. *Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."); *Anderson* v. *Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990) (holding that an appellant's briefs fix the scope of the issues appealed and that, therefore, an appellant cannot breathe life into an omitted theory merely by referring to it at oral argument). That the court inquired about the theory at oral argument does not lower this bar.

We add a coda. Were we to reach the merits of this argument—which we do not—the proper resolution of it is not obvious. The Supreme Court has cautioned that "[t]he overbreadth doctrine is strong medicine that is used sparingly and only as a last resort." *N.Y. State Club Ass'n* v. *City of New York*, 487 U.S. 1, 15 (1988). Thus, a court may overturn a law as overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange*, 128 S. Ct. at 1191 n.6. Courts must "vigorously enforce" this substantiality requirement. *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). In this case, it seems likely that the alleged overbreadth is not sufficiently sprawling to serve as the foundation for a constitutional challenge.

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lurking; it necessitates some developed argumentation addressed to that particular theory. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

The plaintiffs also argued below that the legislature's use of the word "solely" in the statutory text rendered the statute unconstitutionally vague. *See McCullen*, 573 F. Supp. 2d at 421. Although their newly minted argument likewise involves, in part, the statute's use of the word "solely," it is a conceptually different argument.

E. Vagueness.

The plaintiffs contend that the Attorney General's guidance letter renders the 2007 Act void for vagueness because it uses the term "partisan speech"—a term that is allegedly so amorphous "that persons of average intelligence would have no choice but to guess at its meaning and modes of application." *United States* v. *Hussein*, 351 F.3d 9, 14 (1st Cir. 2003). We reject this contention.

The Due Process Clause forbids the sovereign from depriving an individual of liberty pursuant to an excessively vague law. *See id.*; *United States* v. *Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994). This doctrine prevents the enforcement of laws that fail to give persons of ordinary intelligence a reasonable opportunity to know what conduct is proscribed and what is not. *Hill*, 530 U.S. at 732; *Hussein*, 351 F.3d at 14. The Due Process Clause also forbids laws that impermissibly delegate basic policy matters to adjudicators for resolution on an ad hoc or largely subjective basis, thus threatening arbitrary and discriminatory application. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In the district court, the plaintiffs alleged that the 2007 Act was impermissibly vague because of the uncertainty inherent in the terms "solely" and "destination." *See McCullen*, 573 F. Supp. 2d at 421. They also argued that the term "partisan speech," provided as a gloss in the Attorney General's guidance letter (reprinted in the appendix), rendered the statute vague. *Id.* In this venue, the plaintiffs address only the term "partisan speech," a phrase found exclusively in the guidance letter.

When confronting a vagueness challenge to the face of a state statute, we are obliged to accept any limiting

construction that a state agency has authoritatively proffered. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982). It is difficult to understand, however, how or why a challenger can mount a facial attack on a statute that is itself not vague simply because an enforcement official has offered an interpretation of the statute that may pose problems down the road. *See McGuire II*, 386 F.3d at 58; *see also Grayned*, 408 U.S. at 108-09. As a matter of logic, we do not believe that an official's interpretation can render clear statutory language vague so as to make the statute vulnerable to a facial (as opposed to an as-applied) attack.[298] *See McGuire II*, 386 F.3d at 58; *see also United States* v. *Protex Indus.*, Inc., 874 F.2d 740, 743 (10th Cir. 1989) (noting that a statute can be void for vagueness, as applied, as a result of a retroactive expansion of precise statutory language through interpretation).

Even were we to assume arguendo that the plaintiffs' underlying point is that the statute itself is vague and that this lack of precision is exacerbated by the Attorney General's guidance letter, another obstacle would loom. Although the word "partisan" may be vague at the margins, *but see Broadrick*, 413 U.S. at 608, that uncertainty would have no relevance here. After all, the plaintiffs, by their own admission, want to engage in anti-abortion protests; and that conduct, as they must know, falls squarely within the hard core of the proscriptions spelled out in the guidance letter.

We need go no further. "One to whose conduct a statute clearly applies may not successfully challenge it

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[298] The situation may well be different if the statute itself is vague or ambiguous—but that is not the premise of the vagueness argument that the plaintiffs are making here.

for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); *see Broadrick*, 413 U.S. at 608. That is precisely the situation here.

F. Prior Restraint.

We need not linger long over the plaintiffs' claim that the 2007 Act constitutes an impermissible prior restraint on speech. The case law makes manifest that time-place-manner restrictions are analyzed under intermediate scrutiny and not under the more rigorous standard that applies to prior restraints. *See, e.g.*, *Bl(a)ck Tea Soc'y*, 378 F.3d at 12. Consequently, our determination that the 2007 Act is a valid time-place-manner restriction effectively forecloses the plaintiffs' resort to case law involving prior restraints. *See id.* ("If content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in the time-place-manner jurisprudence would be eviscerated.").

VIII. CONCLUSION

To recapitulate, the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face.

We add a caveat. This decision flows naturally from the very heavy burden that plaintiffs must carry in mounting a facial challenge to a state statute. Nothing that we have said forecloses the possibility that, on a better-developed record, this legislative solution may prove problematic in particular applications.

Affirmed.

APPENDIX I: THE ATTORNEY GENERAL'S GUIDANCE.

The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.

The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Similarly, the third exemption—for municipal employees or agents acting within the scope of their employment—does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another

place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 08-10066-JLT

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY A. SMITH, CARMEL FARRELL, AND ERIC CADIN,

Plaintiffs,

v.

MARTHA COAKLEY, in her capacity as Attorney General for the Commonwealth of Massachusetts,

Defendant.

[573 F. Supp. 2d 382]
August 22, 2008

MEMORANDUM

TAURO, J.

Introduction

Plaintiffs challenge the facial constitutionality of a recently revised Massachusetts statute, Mass. Gen. Laws ch. 266, § 120E1/2 ("Act"), which establishes a 35-foot fixed buffer zone around driveways and entrances of reproductive health care facilities ("RHCFs").[1] Fol-

[1] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (Trial Ex.

lowing a Bench Trial held on May 28, 2008, this court finds that the Act survives First Amendment, Equal Protection and Due Process challenges.

Background

A. The Parties

Plaintiffs Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell and Eric Cadin are Massachusetts residents who regularly engage in pro-life counseling outside RHCFs.[2] Defendant Attorney General Martha Coakley is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts. As such, Attorney General Coakley bears responsibility for enforcing the Act. She is sued in her official capacity only.[3]

B. Procedural History

On January 16, 2008, Plaintiffs filed the Complaint, advancing eight counts under 42 U.S.C. § 1983: (1) Free Speech—Time, Place and Manner; (2) Free Speech—Substantial Overbreadth; (3) Free Speech—Prior Restraint; (4) "Free Speech—Free Association—Free Exercise Hybrid;" (5) Free Speech—Viewpoint Discrimination; (6) Due Process—Vagueness; (7) Due Process—Liberty Interest; and (8) Equal Protection.[4]

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1) [#36]. The Act revised parts of Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3) [#38]

[2] *See* Decl. of Eleanor McCullen (Trial Ex. 4) [#39]; Decl. of Jean Blackburn Zarrella (Trial Ex. 5) [#40]; Decl. of Carmel Farrell (Trial Ex. 6) [#41]; Decl. of Eric Cadin (Trial Ex. 7) [#42]; Decl. of Gregory A. Smith (Trial Ex. 8) [#43].

[3] *See* Compl. at 3 [#1].

[4] *See id.* at 13-22 [#1].

Plaintiffs seek that this court: (1) declare that the Act is unconstitutional on its face; (2) declare that the Act is unconstitutional as applied at the Allston-Brighton Planned Parenthood and Women's Health Service; (3) preliminarily[5] and permanently enjoin Defendant from enforcing the Act; (4) award costs and attorneys fees; and (5) grant any other relief that this court deems necessary and proper.[6]

Following Defendant's Answer, and briefing on Plaintiffs' preliminary injunction motion, this court held a Case Management Conference on April 23, 2008. Without objection from the Parties, this court ordered that the matter proceed on the merits in two stages:[7] (1) a Bench Trial on Plaintiffs' facial challenge; and (2) a Bench Trial on Plaintiffs' as-applied challenge.[8]

In early May 2008, the Parties stipulated to the content of the Trial Record for the facial challenge,[9] and filed a Joint Trial Record with this court.[10] On May 14, 2008, the Parties filed Proposed Findings of Fact and Conclusions of Law.[11] Also on May 14, 2008, four indi-

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[5] Pls.' *Mot. for Prelim. Inj.* [#2].

[6] *See* Compl. at 22-23.

[7] This court denied Plaintiffs' *Motion for Preliminary Injunction* without prejudice to re-raising similar issues in a Bench Trial on the merits. *See* Order [#34].

[8] *See id.*

[9] *See* Joint Stipulation as to the Content of the Trial R. for the Bench Trial of Pls.' Facial Challenge [#35].

[10] *See* Trial Exs. 1-29 [Docket Nos. 36-66].

[11] *See* Pls.' Proposed Findings of Fact and Conclusions of Law [#69] ("PFF"); Def.'s Proposed Findings of Fact and Conclusions of Law [#70] ("DFF").

viduals filed an Amicus Brief in support of Plaintiffs' facial and as-applied challenges.[12]

On May 28, 2008, this court held a Bench Trial on Plaintiffs' facial challenge. The Parties presented extensive oral argument, and this court took the matter under advisement.[13]

Factual Findings

A. Notes on Factual Findings

1. Source

The following findings of fact derive from the Joint Trial Record submitted by the Parties. Additionally, this court takes notice of the findings of the First Circuit with respect to the legislative justification for the original statute enacted in 2000 ("2000 Act").[14]

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[12] Mem. of Amicae Curiae [#71].

[13] On June 3, 2008, Plaintiffs filed a *Motion for Leave to File Post-Argument Brief on the Trial of Facial Challenge* [#72], which Defendant opposed. *See* Opp'n to Pls.' Mot. for Leave to File a Post-Trial Brief [#73]. This court denied Plaintiffs' motion. *See* Electronic Order dated June 5, 2008. On June 16, 2008, this court received a preliminary copy of the Bench Trial Transcript ("Prelim. Bench Trial Transcript").

[14] *See McGuire v. Reilly*, 260 F.3d 36, 39-41 (1st Cir. 2001) ("*McGuire I*"); *McGuire v. Reilly*, 386 F.3d 45, 48-49 (1st Cir.2004) ("*McGuire II*"). *See also, e.g., Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 456 n. 9 (1st Cir. 2000) ("The Rules of Evidence state that the court may take judicial notice of legislative facts whether requested or not. *See* Fed. R. Evid. 201(c). A 'legislative fact' is defined as 'one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)."); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 172

2. Focus on Facial Challenge

Plaintiffs urge this court to adopt various findings of fact relating to, among other things, the following: Plaintiffs' activities at certain RHCFs; specific incidents at certain RHCFs; and the operation of the buffer zone at certain RHCFs.[15] Additionally, Defendant asks this court to adopt certain findings of fact relating to the effects of the Act, to date, at certain RHCFs.[16] While this information may be important to Plaintiffs' as-applied challenge, it is largely irrelevant to the facial challenge. Moreover, because the as-applied challenge will be tried separately, this court does not have a complete record from which to make such findings.

B. History of the 2000 Act

As noted by the First Circuit, "[b]y the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside RHCFs."[17] These included a shooting that occurred on December 30, 1994, in which two people were killed and several others injured.[18] Massachusetts courts also issued numerous injunctions prohibiting certain individuals from

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F.3d 104, 112 (1st Cir.1999) ("[S]o-called 'legislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts.") (citing Fed. R. Evid. 201 advisory committee's note; *Knight v. Dugger*, 863 F.2d 705, 742 (11th Cir.1988)).

[15] *See* PFF at 2-10.

[16] *See* DFF at 16-18.

[17] *McGuire I*, 260 F.3d at 38.

[18] *See id.* at App. B.

engaging in violent, harassing or intimidating activity at RHCFs.[19]

Responding to these concerns, "the Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly."[20] "That investigation yielded solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs."[21]

Part of the investigation included a state senate hearing on the matter in April of 1999.[22] At the hearing, the "received testimony chronicled the harassment and intimidation that typically occurred outside RHCFs."[23] In addition, "numerous witnesses addressed the emotional and physical vulnerability of women seeking to avail themselves of abortion services, and gave accounts of the deleterious effects of

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[19] *See, e.g., Planned Parenthood League of Mass., Inc. v. Bell*, 677 N.E.2d 204 (1997); *Commonwealth v. Filos*, 649 N.E.2d 1085 (1995); *Planned Parenthood League of Mass., Inc. v. Blake*, 631 N.E.2d 985 (1994); *Commonwealth v. Cotter*, 612 N.E.2d 1145 (1993); *Commonwealth v. Brogan*, 612 N.E.2d 656 (1993); *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361 (1990); *Commonwealth v. Manning*, 673 N.E.2d 73 (1996).

[20] *McGuire I*, 260 F.3d at 44.

[21] *Id.*

[22] *Id.* at 39.

[23] *Id.* For copies of the written testimony received by the senate, see Exhibits A-F to the Affidavit of Richard A. Powell (Trial Ex. 29) [#66-2-7]. The testimony includes numerous specific observations and incidents.

overly aggressive demonstrations on patients and providers alike."[24]

The senate, "[b]ased in part on this testimony, ... concluded that existing laws did not adequately protect public safety in areas surrounding RHCFs," and the Legislature began considering new laws to address the problem.[25] Initially, in Senate Bill 148, the senate considered a 25-foot fixed buffer zone around RHCF entrances and driveways. The First Circuit explained:

> To remedy this situation, the senate favored the creation of fixed buffer zones. The sponsors of the bill left no doubt that they intended the proposed law to "increase public safety in and around [RHCFs]" while "maintaining the flow of traffic and preventing congestion" there. S.B. 148 ... § 1. In the bargain, the sponsors expected the law to provide "reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." It thereby would "create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services ... to its patients." *Id.*
>
> Skeptics worried that the proposed law might offend the Constitution. To stave off these

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[24] *Id.*

[25] *Id.*

> gloom-and-doom predictions, the senate, on November 3, 1999, asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the bill's constitutionality.
>
> On January 24, 2000, the SJC concluded that the Constitution presented no obstacle to enactment. *Opinion of the Justices to the Senate*, 430 Mass. 1205, 1211-12, 723 N.E.2d 1 (2000). The SJC advised that the bill, as framed, was unrelated to the content of protected expression. *Id.* at 1209. Moreover, the restrictions imposed had a rational basis in view of the heightened governmental interest that arises when "advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." *Id.* at 1210.[26]

Following the SJC's opinion, the state senate adopted the bill on February 29, 2000.[27] On June 28, 2000, however, the Supreme Court decided *Hill v. Colorado*.[28] There, the Court considered the constitutionality of a Colorado statute that regulated speech-related conduct around RHCFs.[29] The statute created a "floating" buffer zone within a 100-foot "fixed" buffer zone.[30] Plaintiffs challenged the "floating" zone, which

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[26] *Id.* at 39-40 (spacing modified).

[27] *Id.* at 40.

[28] 530 U.S. 703 (2000).

[29] *See id.* at 707.

[30] *See id.*

"ma[de] it unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person....' "[31]

The Court upheld the Colorado statute as a valid time, place and manner regulation, finding that the law was "narrowly tailored" and "serve[d] governmental interests that are significant and legitimate and that the restrictions are content neutral."[32] This court will address *Hill* in more detail below.

C. The 2000 Act[33]

Subsequently, the Massachusetts Legislature decided to follow the Court-approved Colorado model of a "floating" buffer zone within a "fixed" buffer zone. The state house redrafted Senate Bill 148 accordingly, and on July 28, 2000, adopted an Act Relative to Reproductive Health Care Facilities, Chapter 217 of the Acts of 2000 ("2000 Act").[34] The senate approved on July 29, 2000, and Governor Celluci signed the bill on August 10, 2000.[35]

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[31] *Id.*

[32] *Id.* at 725-26.

[33] Judge Harrington, at the trial level, and the First Circuit on appeal, have adjudicated the constitutionality of the 2000 Act, and much of the information in this section draws from their discussions in the *McGuire* line of cases.

[34] *See McGuire I*, 260 F.3d at 40; Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3).

[35] *See McGuire I*, 260 F.3d at 40; Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3).

The 2000 Act created an 18-foot fixed buffer zone around RHCFs, within which a 6-foot floating buffer zone existed around any person or occupied motor vehicle:

> (b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway.[36]

The 2000 Act, however, exempted certain groups from its coverage:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other

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[36] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000) (Trial Ex. 3).

municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.[37]

Additionally, the provisions of the 2000 Act were only in "effect during a facility's business hours and [only] if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted."[38]

D. Attorney General's Guidance on the 2000 Act

On November 10, 2000, the Massachusetts Attorney General's office sent a letter to the Brookline and Boston police departments regarding the 2000 Act.[39] The letter explained the Attorney General's interpretation of the exemption for "employees or agents of such facility acting within the scope of their employment,"[40] and "noted that if escorts were to approach within six feet of a woman within the fixed buffer zone in order to 'hurl[] epithets at demonstrators,' then their actions would not be within the scope of their employment and they would not be protected by the exemption."[41]

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[37] *Id.*

[38] *Id.* § 120E1/2(2)(c).

[39] *See McGuire II*, 386 F.3d at 52.

[40] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000) (Trial Ex. 3).

[41] *McGuire II*, 386 F.3d at 52.

On May 23, 2001, members of the Attorney General's office met with staff from the Planned Parenthood League of Massachusetts, "to communicate the Attorney General's interpretation that the Act's exemption for clinic employees and agents acting within the scope of their employment would not protect such persons if they were to use the exemption to engage in counter-protests, counter-education, or counter-counseling against anti-abortion views, rather than simply assisting the patients into the clinic and protecting clinic access."[42]

On February 14, 2003, an assistant attorney general issued a letter to the police departments with RHCFs affected by the 2000 Act.[43] The letter reiterated that " 'all persons in the restricted area, including clinic employees and agents, are subject to the restrictions in Section 120E 1/2(b) of the Act, including the restriction on oral protest, education, or counseling[,]' and that clinic employees and agents may not use the exemption to 'express their views about abortion[.]' "[44] As noted by the First Circuit, this letter "did not signify a new interpretation; it was merely a restatement of an old position. In this most recent clarification of the interpretation, the Attorney General has clearly construed the exemption to exclude pro-

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[42] *Id.* Also during July of 2001, the Attorney General's office provided training consistent with its November 10, 2001 guidance letter to the Boston and Brookline police departments. *Id.*

[43] *McGuire v. Reilly*, 271 F. Supp. 2d 335, 339 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004). Hereinafter, this court will refer to the letter as the "2003 Guidance Letter."

[44] *Id.* at 339-40.

abortion or partisan speech from the term 'scope of their employment.' "[45]

F. *McGuire I* and *McGuire II*

Three pro-life "sidewalk counselors"[46] challenged the facial and as-applied constitutionality of the 2000 Act in a federal lawsuit in this District. Judge Harrington found that the statute—on its face—violated the First Amendment, and preliminarily enjoined its enforcement pending a hearing on the merits.[47]

In *McGuire v. Reilly* ("*McGuire I*"), the First Circuit reversed, holding that the statute lawfully regulated the time, place and manner of speech without discriminating based on content or viewpoint, and remanded the case to the district court for further proceedings.[48]

On remand, the plaintiffs pressed facial and as-applied challenges on the merits. Based on the First Circuit's decision in *McGuire I*, Judge Harrington granted Defendants summary judgment on Plaintiffs' facial challenge,[49] but denied summary judgment on the as-applied challenge pending additional discovery and the filing of a renewed motion for summary judgment.[50]

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[45] *McGuire II*, 386 F.3d at 52 n.1.

[46] *Id.* at 48.

[47] *See McGuire v. Reilly*, 122 F. Supp. 2d 97 (D. Mass. 2000) (Harrington, J.), *rev'd*, *McGuire I*, 260 F.3d 36 (1st Cir. 2001).

[48] *See McGuire I*, 260 F.3d 36.

[49] *See McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (Harrington, J.).

[50] *Id.* at 194.

After additional discovery, Judge Harrington granted Defendants summary judgment on the as-applied challenge.[51] On the issue of enforcement following *McGuire I*, Judge Harrington found that "the Act has since been interpreted by the Attorney General so as to require evenhanded enforcement of its prohibitions, even against clinic employees and agents, and the Attorney General's interpretation has been adopted by the law enforcement authorities."[52]

In *McGuire v. Reilly* ("*McGuire II*"), the First Circuit affirmed summary judgment on both the facial and as-applied challenges.[53] *McGuire I* controlled the facial challenge, and the plaintiffs "offered no reason why the conclusion reached in *McGuire I* ... is flawed."[54] Additionally, the court concurred with Judge Harrington's assessment of the Commonwealth's enforcement position, holding that "[t]he Attorney General's interpretation ... is important for our purposes ... because it is clearly a proper, content-neutral way of interpreting the exemption."[55] With respect to the as-applied challenge, the court concluded that "there is no evidence that the police have enforced this statute in anything other than an evenhanded way...."[56]

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[51] *See McGuire v. Reilly*, 271 F. Supp. 2d 335 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004).

[52] *Id.* at 341.

[53] *See McGuire II*, 386 F.3d 45.

[54] *Id.* at 59.

[55] *Id.* at 64.

[56] *Id.* at 65.

F. The Legislature Determines that the Statute Needs to be Revised

1. Proposed Senate Bill 1353

Following the passage and operation of the 2000 Act, members of the Legislature became aware of continued and serious public safety problems in the areas adjacent to RHCF entrances and driveways, including significant concerns regarding safe patient access to medical services.[57]

In 2007, responding to these concerns, several members of the Legislature introduced Senate Bill 1353, "An Act Relative to Public Safety." The proposed preamble read:

> Whereas preservation of public safety is a fundamental obligation of state government;
>
> Whereas pedestrians have a right to travel peacefully on Massachusetts streets and sidewalks; and
>
> Whereas clearly defined boundaries improve the ability of safety officials to protect the public;[58]

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[57] *See, e.g.*, Hearing Transcript at 7-13 (legislators—including some of the bill's sponsors—discussing public safety concerns at RHCFs, problems with the 2000 Act, and the origins of Senate Bill 1353).

[58] An Act Relative to Public Safety, S.B. 1353, 185th Gen. Court (Mass.2007) (enacted), Ex. A to Aff. of Adam T. Martignetti ("Martignetti Aff.") (Trial Ex. 24) [#61-2]. Plaintiffs argue that the preamble constitutes "three very different facts underlying [the bill's] purpose." Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 52[#16]. This court disagrees. All three sections of the preamble clearly relate to public safety.

The bill modified the size and nature of the buffer zone:

> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of thirty-five feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance to, exit from or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.[59]

The Legislature's Joint Committee[60] on Public Safety and Homeland Security ("Committee") held a public Hearing on the bill on May 16, 2007, and received written and oral testimony from law enforcement officials;[61] RHCF staff, volunteers and representatives; and representatives of various advocacy organizations.[62] At the Hearing, the Committee also viewed video footage and photographs of protest activity at

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[59] *Id.*

[60] Members of the state house and senate serve on the Committee.

[61] Captain Williams Evans ("Evans") of the Boston Police Department testified. Evans is the police commander for the South End, Back Bay, Lower Roxbury and Fenway sections of Boston. *See* Transcription of Videotape of Hearing of the Joint Committee on Public Safety and Homeland Security at 25 ("Hearing Transcript"), Ex. C to Aff. of Vineeth Narayanan ("Narayanan Aff.") (Trial Ex. 26 [#63-4]. Attorney General Coakley, Mary Beth Heffernan, Undersecretary for Criminal Justice, and William Keating, Norfolk County District Attorney, also testified.

[62] *See* Martignetti Aff. at 1 (Trial Ex. 24)[#61].

certain RHCFs.[63] Additionally, the Committee received written correspondence supporting and opposing the bill.[64]

2. Public Safety and Access to Medical Services

The Committee received testimony that, despite the 2000 Act's floating and fixed buffer zones, significant public safety concerns continued to exist at RHCFs in the Commonwealth, including major concerns regarding safe patient access to medical services. Attorney General Martha Coakley ("Coakley") explained that the fixed buffer zone was necessary to address the situation:

> This is an important public safety issue. Over the years, reproductive healthcare facilities have been the scene of mass demonstrations, congestion, blockages, disturbances, and even murders. SB 1353 will help ensure greater safety along our public ways and sidewalks and prevent violence, harassment and intimidation of women who are attempting to exercise their fundamental right to access health care.
>
> ...
>
> I support the bill's recognition that "clearly defined boundaries improve the ability of safety officials to protect the public."
>
> ...

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[63] *See, e.g.*, Hearing Transcript at 16 (Trial Ex. 26) [#63-4].

[64] *See* Compilation of Letters at 2-25 (Trial Ex. 17)[#52].

Facility employees, volunteers, patients and prospective patients are routinely harassed as they try to enter and exit facilities for medical counseling and treatment. For example, at the Boston location, which has a recessed door, protesters are able to stand close to the entrance, with some protesters standing right at the entrance. Demonstrators regularly crowd facility entrances and surround women, facility employees and volunteers with graphic and discomfiting pictures of aborted fetuses, and shout at and taunt them calling them "baby killers" and "murderers."

...

[P]atients and employees are forced to step around or through the protestors as they make their way into the building. We have heard of some cases where women arrive at the facilities and then leave because they are too upset to pass through the gauntlet of protestors.

Protestors also stand and block cars as patients and employees attempt to enter the driveway or garage entrance to these facilities. Other times, protestors circle cars and put their faces against, or in close proximity to, the car windows to scream at and sometimes videotape people in their cars. In some cases, protestors throw anti-abortion literature and leaflets into people's cars as they enter or exit the facilities. Even more egregious are the protestors who dress as Boston Police Department officers and approach women and their companions at close distance, pretending that they are escorting them to the clinic's entrance, only to taunt

> them or force leaflets into their hands as they make their way to and from the healthcare facilities.
>
> All of these actions can and do easily spark reaction and response and create an unsafe, dangerous risk along our public ways. The actions directly impede the normal flow of traffic along the Commonwealth's public ways and sidewalks and hinder women's ability to access reproductive healthcare.[65]

The Legislature also heard testimony from RHCF staff, volunteers and law enforcement personnel regarding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways. Additionally, the Legislature learned about protesters blocking access RHCFs by physically positioning themselves very close to RHCF entrances and driveways.[66] Examples included the following:

- One clinic volunteer at a Boston RHCF reported:

> The protestors are moving closer and closer to the main door. They scream and block the way for the patients to get into

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[65] Martha Coakley Written Testimony, Ex. D to Martignetti Aff. (Trial Ex. 24) [#61-5] (spacing modified).

[66] Indeed, Captain Evans testified:

> A lot of people are under the misconception that [the law] prevents protestors from going into that buffer zone, which is incorrect. Protestors can stand up right in front of the door. A lot of them hold signs right there. As long as they stay stationary, you know, they can stand in front of that door. William Evans Oral Testimony, Hearing Transcript at 25 (Trial Ex. 26) [#63-4].

> the clinic. We fill out police reports almost every week regarding the way they encroach upon the door, but nothing has changed.[67]
>
> They get very close to the patients and escorts inside the buffer zone....[68]
>
> [T]hey're getting so close that patients are terrified to even walk into the clinic. I've had people ask me, isn't there a back way....[69]
>
> When it is raining, it is exceptionally bad. Many of the protestors are inside the buffer zone with very large umbrellas and have no regard for who they hit with them. I have often been swiped with the points on their umbrellas and have nearly fallen to avoid being hit.[70]

- The president of Planned Parenthood League of Massachusetts personally observed the following at the organization's Boston facility:
  - Protestors screaming at patients and employees inside the current 'buffer zone', usually right at the doorway....

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[67] Gail Kaplan Written Testimony, Ex. C to Martignetti Aff. (paragraph number omitted) (Trial Ex. 24) [#61-4].

[68] *Id.* (paragraph number omitted).

[69] Gail Kaplan Oral Testimony, Hearing Transcript at 40 (Trial Ex. 26) [#63-4].

[70] Gail Kaplan Written Testimony, Ex. C to Martignetti Aff. (paragraph number omitted) (Trial Ex. 24) [#61-4].

- Protesters photographing and filming into patients and employees' cars and taking photos of license plate numbers to post on websites
- Protesters standing in front of cars and the keypad to the garage to block access, so that they can throw pamphlets and other propaganda into cars entering the garage
- And, most deceptively, I've seen protesters dress up wearing Boston Police T-shirts and hats, trying to collect patient contact information, videotaping, and in other ways trying to intimidate those who are simply exercising their legal right to seek confidential medical services[71]

- A Planned Parenthood volunteer reported that protesters stood in front of the building's entrance, "every Saturday morning, every week."[72] She explained:

> There are several long-time protesters who appear in front of Planned Parenthood....
>
> When women approach the building, protesters fan out and approach them.
>
> ...
>
> The clear intent of the vast majority of protesters is to deter people from entering the building at all. The current buffer zone ... does not permit protesters to 'approach'

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[71] Diane Luby Written Testimony at 2, Ex. G to Martignetti Aff. (Trial Ex. 24) [#61-8].

[72] Liz McMahon Written Testimony at 1, Ex. F to Martignetti Aff. (Trial Ex. 24) [#61-7].

> anyone without consent in the zone, but it does not speak to standing still in front of the building's entrance and thereby forcing patients to approach them.
>
> ...

Physical blocking is practiced regularly by protesters. They either stand in front of the door, in the middle of the sidewalk, or in front of car doors as cars pull up to the sidewalk. Some people pull up in cars and roll down their window to ask about the clinic's secure parking garage. If the protesters get to the car first, they have been repeatedly heard to tell people that the garage is closed, when it is not. They also shove pamphlets through the open window, regardless of the occupant's requests.

In the rear of the building, near the clinic's garage entrance ... protesters often wait by the door and video tape the patients' cars' license plates.[73]

- At an Attleboro RHCF, a patient advocate reported:

> [P]rotesters impede access to clinic doors, but also create safety issues for the general public trying to use sidewalks, streets or driveways.
>
> ...
>
> [P]rotesters walk back and forth across the entrance of the driveway.... Though prohibited from standing in the entrance of the driveway, they frequently stop there until threatened with police action. There have

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[73] *Id.* at 1-2.

> been instances of picketers either slowing or speeding up to narrowly avoid being hit by cars driven by staff. Patients have reported feeling too intimidated by the pacing protesters to enter the property, and turning back.[74]

- 1 At one RHCF, on a weekly basis, women try to drive to the facility but turn away "because they're afraid to enter the parking lot entranceway, [protesters] will block so as not to allow the car to come in, and then we have the other protestors dressed in paraphernalia who will come over to the window with a clipboard and ask them to please sign in before they come through the driveway."[75]
- Likewise, at one RHCF, "You can also see people circling in the same car around and around, and every time they pull up, you can see that they want to go out and they'll ask where is the garage and then they never stop."[76]
- A protester followed a woman into a Boston RHCF entranceway. At the same location, another protester approached and placed her head inside a car outside the clinic.[77]

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[74] Melissa Conroy Written Testimony, Ex. B to Martignetti Aff. (Trial Ex. 24) [#61-3].

[75] Michael Baniukiewicz Oral Testimony, Hearing Transcript at 50-51 (Trial Ex. 26) [#63-4].

[76] Liz McMahon Oral Testimony, Hearing Transcript at 51 (Trial Ex. 26) [#63-4].

[77] *See* Martha Coakley Oral Testimony, Hearing Transcript at 18-19 (Trial Ex. 26) [#63-4].

- A protester wearing a "Boston Police" shirt, standing immediately next to a car trying to enter an RHCF garage.[78]
- Protestors "wearing police hats and police uniforms" as a way to get patients and others to consent to an approach.[79]

3. Law Enforcement's Position

The Legislature also received testimony about the difficulties of enforcing the 2000 Act.[80] The record demonstrates that these difficulties reduced the efficacy of the statute's intended protections, and were part of the reason that significant public safety concerns continued to exist at RHCFs. Attorney General Coakley explained:

> The current law provides no clearly defined boundary because it is a "floating" buffer zone

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[78] William Evans Oral Testimony, Hearing Transcript at 36 (Trial Ex. 26) [#63-4].

[79] *Id.* at 35-37.

[80] Plaintiffs argue that because a proposed amendment to Senate Bill 1353 did not make it into the final bill, "it appears the General Court rejected allegations that the [2000] Act was enforceable." Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 51. The proposed amendment was a line that stated, "The general court hereby finds that law enforcement officials have testified about practical problems related to the enforcement of [the 2000 Act]." *Id.* (*citing* Mass. Senate Journal, Oct. 23, 2007). This argument is unpersuasive. The Legislature may not have adopted this amendment for a number of reasons, upon which this court will not speculate. Regardless, however, of why this line was not included, the Legislature heard and considered testimony regarding enforcement difficulties with the 2000 Act. The record also demonstrates that enforcement difficulties were related to the public safety problems.

> within a defined radius of eighteen feet, so the buffer zone effectively moves and shifts as people pass along the public way to facility entrances or driveways. Either ignoring the law, or inadequately measuring the six-foot distance around a moving person, protestors routinely invade the existing buffer zone *in violation of the law*. This fact alone has made it very difficult if not impossible for police to be able to immediately or ever determine whether a violation has occurred.
>
> Another problem with the existing law is the inability to discern whether a patient, her companions, or facility employees have consented to a given protester's approach. Some protesters have said that they believed that a patient "consented" because of the way she made eye contact or because a patient uttered a statement in response to a protestor's comment (even if that statement was not one of consent)
>
> ...
>
> Given the lack of a clearly defined buffer zone boundary, it has been very difficult, if not impossible, for police officers to monitor the distance these protestors maintain between themselves and the persons approaching the facilities and determine if there has been a violation; in other words, to enforce the law.[81]

Echoing Coakley's remarks, Massachusetts law enforcement personnel reported significant difficulties in

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[81] Martha Coakley Written Testimony at 4-6, Ex. D to Martignetti Aff. (emphasis in original) (spacing modified) (Trial Ex. 24) [#61-5].

enforcing the 2000 Act, and urged legislators to modify the law. Captain Evans reported, "This law, the way it stands, the current buffer zone with the 18-foot buffer zone, makes it very difficult for us to enforce the law."[82] Mainly, the police had trouble determining whether a protester had "approached" a person within the six feet floating buffer, without that person's consent. Evans explained:

> What [the protesters] have to do is make an approach. Now what an approach is is very hard to determine; whether they stick out their hand, that's an approach; where they take a step forward, that's an approach. Basically, it turns us into basically something like—I like to make the reference of a basketball referee down there, where we're watching feet, we're watching hands.[83]

This "constant watching" proved difficult and created a public safety problem. At one of the RHCFs, for example, there have been "over 100 protestors every Saturday and a lot of them go right up in the faces of patients entering the premises."[84] Additionally, such surveillance was a significant "tying up of resources" that the police "had to deal with [for] seven years."[85]

Contrary to Plaintiffs' assertions at oral argument,[86] the police and district attorneys tried to prose-

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[82] William Evans Oral Testimony, Hearing Transcript at 25 (Trial Ex. 26) [#63-4].

[83] *Id.* at 25-56.

[84] *Id.* at 26-27.

[85] *Id.* at 26.

[86] *See, e.g.*, Prelim. Bench Trial Transcript at 73.

cute violations of the 2000 Act. Evans indicated his frustration with trying to prosecute violations at one of the RHCF locations:

> We've trying [sic] everything, honestly. We've tried violation of the buffer zone, and we've brought a few cases up to Brighton Court and the court has basically not supported us....
>
> Chairman, we know all the players down there. We know the regular protesters. We back up the stay-away orders and nothing seems to work down there.[87]

Evans noted that at one of the RHCFs, police had made "no more than five or so arrests."[88] The low number of arrests, however, was due to the difficulty of enforcing the law, not a lack of problematic conduct. Evans explained:

> Again, [it is] a very difficult law to enforce, what an approach is, what isn't. I mean, like I said, people can stand inside the buffer zone, and given the current set up of Planned Parenthood there, their door is in 10 feet of—actually, their buffer zone is really only 8 feet outside because of the setup.
>
> So it's such close quarters as it is there that everybody is in everybody's face, no matter what. So the buffer zone basically is no good, it really isn't, because just the proximity. It's almost like a goalie's crease out there....

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[87] William Evans Oral Testimony, Hearing Transcript at 34-35 (Trial Ex. 26) [#63-4].

[88] *Id.* at 33.

> So given that fact, it makes it very difficult for us to say someone is violating it because they're allowed to stand outside the door, with the sign in their hand.[89]

In response to these problems, Captain Evans urged the Legislature to implement the 35-foot fixed buffer zone:

> Week in and week out, we are constantly receiving calls down there [at one of the facilities], both from protestors and from Planned Parenthood on violations. I think clearly having a fixed buffer zone, where everyone knows the rules and nobody can go in that and protest, will make our job so much easier. I think you've seen the video; you see what we have to deal with. You know, it's a very difficult rule to enforce.
>
> You know, there's the misconception that it's a fixed area where no protestors can go. That would be great. That would make our job so much easier.
>
> ...
>
> So I encourage the Committee and the legislators to support this bill. Not only will it safeguard the patients going in there, but it will also make the public safety official's job a lot easier. So I welcome the 35-foot buffer zone.[90]

With respect to the problem of protesters wearing police hats and uniforms, Evans noted:

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[89] *Id.* at 33-34.

[90] *Id.* at 26-27.

> [W]e've tried everything, and I think the only thing honestly that will keep these people out and the patients safe is to establish a fixed zone. That way there's no watching feet, watching hands and allowing protesters right up in their face.[91]

4. First Amendment Concerns Articulated by Advocacy Groups

The Public Safety Committee also received testimony and correspondence from several organizations that voiced First Amendment concerns about the bill. For example, the American Civil Liberties Union of Massachusetts opposed the bill, mainly on overbreadth grounds.[92] Wendy Kaminer of the Defending Dissent Foundation expressed her "dismay about the effect of this bill on free speech."[93] Marie Sturgis of Massachusetts Citizens for Life, Inc. testified, "To increase the size of the existing area without substantial reason would be an action that demonstrates unquestionable bias and clashes with First Amendment rights."[94] C.J. Doyle of the Catholic Action League of Massachusetts stated, "The proposed expansion of existing buffer zone legislation represents yet another effort to impose a content based restriction on freedom of speech, and to impair other constitutionally protected First Amend-

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[91] *Id.* at 35.

[92] *See* Statement of the ACLU of Massachusetts (Trial Ex. 17)[#52].

[93] Wendy Kaminer Written Testimony at 1 (Trial Ex. 17)[#52].

[94] Marie Sturgis Written Testimony (Trial Ex. 17)[#52].

ment activity such as freedom of religion and freedom of assembly."[95]

5. Balancing First Amendment Concerns

The Legislature specifically acknowledged these First Amendment concerns, and took them into account. Indeed, at the May 16, 2007 Hearing, several legislators discussed the importance of balancing public safety considerations with the First Amendment rights of the protesters. Representative Marty Walz explained:

> What we're seeking here is to amend the existing buffer zone law around healthcare clinics to establish a fixed buffer zone of only 35 feet, so much smaller than the 150 feet that we're accustomed to around polling places, and so for that 35 feet, we think that is an appropriate balance and one that strikes the right balance between First Amendment rights of protesters and the rights of women and other patients and family members and staff members to enter unimpeded into the healthcare clinics, so to recognize that there are competing rights and interests here, just as there are at polling places, and we think a 35-foot fixed buffer zone strikes the right balance to protect women entering and exiting the clinics.[96]

Similarly, Representative Michael Festa stated that the 2000 Act balanced the "First Amendment is-

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[95] Letter from C.J. Doyle, Catholic Action League to Committee, May 16, 2007 (Trial Ex. 17)[#52].

[96] Marty Walz Oral Testimony, Hearing Transcript at 7 (Trial Ex. 26) [#63-4].

sues" with the concern "that without unfettered and reasonable access to these health services, that many women were being intimidated from having those services provided in an appropriate manner."[97] Addressing the 2007 Act, Representative Festa commented:

> I think this bill, quite frankly, strikes the balance in a way in 2007 that we can acknowledge, does give due respect for those who feel that they have need to express their objections to this whole situation, and at the same time, acknowledge that 35 feet is quite reasonable....
>
> [T]his bill, I think, fundamentally does what needs to be done today, which is to give that protection and also afford the right to those who are concerned to express their views.[98]

The Legislature also specifically solicited and heard testimony on balancing these concerns. Senator Jarrett Barrios, the Committee's Chairman, stated:

> [S]ince I've got three of the finest lawyers in Massachusetts in front of me, and one of the leading arguments that is made in opposition to this is infringement on First Amendment rights which the federal government, and obviously there's a state equivalent to that.
>
> ...

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[97] Michael Festa Oral Testimony, Hearing Transcript at 11-12 (Trial Ex. 26) [#63-4].

[98] *Id.* at 12-13.

> And I'm interested in your thoughts, if you have any, specifically as to why that's not the case.[99]

Attorney General Coakley responded that the law was a constitutional time, place and manner restriction that appropriately balanced patient rights, protester rights and public safety considerations.[100] Additionally, after recognizing the importance of First Amendment rights,[101] Coakley emphasized the balancing process: "There's always a balance involved" in First Amendment situations, "and I think it's an appropriate question and I think the Legislature has to weigh this."[102] Similarly, Keating noted, "I also view this in a Constitutional sense as a contest of competing freedoms...."[103] Heffernan agreed with Coakley and Keating, and briefly echoed their comments.[104]

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[99] Jarrett Barrios Oral Testimony, Hearing Transcript at 29-30 (Trial Ex. 26) [#63-4].

[100] Martha Coakley Oral Testimony, Hearing Transcript at 30-32 (Trial Ex. 26) [#63-4]. *See also* Martha Coakley Written Testimony at 6-7, Ex. D to Martignetti Aff. (discussing how the proposed bill protected First Amendment rights) (Trial Ex. 24) [#61-5].

[101] *Id.* at 30 ("I think all four of us take that right of the First Amendment extremely seriously....").

[102] *Id.* at 30.

[103] William Keating Oral Testimony, Hearing Transcript at 32 (Trial Ex. 26) [#63-4].

[104] *See* Mary Beth Heffernan Oral Testimony, Hearing Transcript at 32-33 (Trial Ex. 26) [#63-4].

G. The 2007 Act

After receiving and considering this testimony, the Legislature enacted Senate Bill 1353 on November 8, 2007,[105] titled "An Act Relative to Reproductive Health Care Facilities ("Act or 2007 Act")," Chapter 155 of the Acts of 2007.[106] The Act contained an emergency preamble:

> *Whereas*, The deferred operation of this act would tend to defeat its purpose, which is to increase forthwith public safety at reproductive health care facilities, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety.[107]

The Act itself read:

> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:
>
> SECTION 1. Section 120E1/2 of chapter 266 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by inserting after the word "within", in line 2, the following words:– or upon the grounds of.

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[105] *See* Martignetti Aff. at 3 (Trial Exhibit 24)[#61] ("Senate No. 1353 in its final form was passed by the Senate and the House on November 8, 2007.").

[106] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (emphasis in original) (Trial Ex. 1)[#36].

[107] *Id.* (emphasis in original).

SECTION 2. Subsection (b) of said section 120E1/2 of said chapter 266, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:- No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.[108]

The Act did not affect the 2000 Act's exemptions:

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for

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[108] *Id.*

> the purpose of reaching a destination other than such facility.[109]

The Act also maintained the business hours and clearly marked restriction of the 2000 Act: "The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted."[110]

Governor Patrick signed the bill on November 13, 2007.[111]

H. Attorney General's Guidance on the 2007 Act

On January 25, 2008, the Attorney General's Office sent a letter to law enforcement personnel and RHCFs subject to the Act's coverage.[112] The letter summarized the Act, and emphasized that the Act's provisions were

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[109] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (spacing modified) (Trial Ex. 3)[#38].

[110] *Id.* § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3).

[111] *See* An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (Trial Ex. 1); Martignetti Aff. at 3 (Trial Ex. 24)[#61].

[112] *See* Narayanan Aff. at 1 (Trial Ex. 26)[#63]; Letters from Maura T. Healey, Chief, Civil Rights Division, to the Boston and Brookline Police Departments, Ex. A to Narayanan Aff. (Trial Ex. 26) [#63-2]; Letters from Maura T. Healey, Chief, Civil Rights Division, to Planned Parenthood League of Massachusetts and Women's Health Services, Ex. B to Narayanan Aff. (Trial Ex. 26) [#63-3]. Aside from slight differences in the introductory paragraph, the letters are identical. Accordingly, this court will refer to the letter as the "2008 Guidance Letter."

in effect only during an RHCF's business hours and only if the boundaries were "clearly marked and posted."[113] The letter also provided "guidance to assist you in applying the four exemptions" in the Act, which consisted of the following four paragraphs:

> The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.
>
> The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.
>
> Similarly, the third exemption—for municipal employees or agents acting within the scope of their employment—does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.
>
> Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—

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[113] 2008 Guidance Letter at 1-2 (Trial Ex. 26).

> applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).[114]

The Attorney General's approach with respect to the second exemption directly tracks its approach to this exemption in the 2000 Act,[115] an approach approved by the First Circuit in *McGuire II*.[116]

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[114] *Id.* at 2-3 (Trial Ex. 26).

[115] In the 2003 Guidance Letter, the Attorney General emphasized that " '*all persons* in the restricted area, including clinic employees and agents, are subject to the restrictions in Section 120E 1/2(b) of the Act, including the restriction on oral protest, education, or counseling[,]' and that clinic employees and agents may not use the exemption to 'express their views about abortion[.]' " *McGuire v. Reilly*, 271 F. Supp. 2d 335, 339-40 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004) (*quoting* 2003 Guidance Letter) (emphasis added).

[116] *McGuire II*, 386 F.3d at 64 ("[W]e find the Attorney General's interpretation to be one very likely interpretation of the exemption's language ... [,]" and it "is important for our purposes ... because it is clearly a proper, content-neutral way of interpreting the exemption."). *See also supra* Factual Findings § E.

Discussion: Legal Standard for Facial Challenge

Three different standards may apply to Plaintiffs' facial challenge.[117]

In *United States v. Salerno*, the Supreme Court held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[118]

Second, although "some Members of the Court have criticized the Salerno formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.' "[119]

Lastly, in the First Amendment context, there is another "type of facial challenge ... under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are un-

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[117] *See, e.g., United States v. Carta*, 503 F. Supp. 2d 405 (D. Mass. 2007) (Tauro, J.) ("The precise test to apply to a facial challenge is not clear.").

[118] 481 U.S. 739, 745 (1987). *See also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion."); *McGuire I*, 260 F.3d at 46-47 ("a party who mounts a facial challenge to a statute must carry a significantly heavier burden than one who seeks merely to sidetrack a particular application of the law.").

[119] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 739-40, and n.7 (1997) (Stevens, J., concurring in judgments)).

constitutional, 'judged in relation to the statute's plainly legitimate sweep.' "[120]

For the reasons below, the Act survives under all three standards.

Discussion: First Amendment Challenge

A. First Amendment Doctrine

The Free Speech Clause of the First Amendment states that "Congress shall make no law ... abridging the freedom of speech...."[121] This prohibition applies to the states by virtue of the Fourteenth Amendment.[122] As clarified by the First Circuit, "Notwithstanding its exalted position in the pantheon of fundamental freedoms, free speech always must be balanced against the state's responsibility to preserve and protect other important rights. This balance may be weighted differently, however, depending upon the nature of the restriction that the government seeks to foster."[123]

"The Supreme Court has articulated a framework for determining whether a particular regulation impermissibly infringes upon free speech rights. That framework dictates the level of judicial scrutiny that is

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[120] *Id.* at 1191 n.6 (*citing New York v. Ferber*, 458 U.S. 747, 769-771 (1982) and *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[121] U.S. Const. Amend. I.

[122] *See Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 30-31 (1st Cir. 2001) (*citing Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

[123] *McGuire I*, 260 F.3d at 42. *See also Knights of Columbus*, 272 F.3d at 31 ("Despite the uncompromising language in which this proscription is couched, it is not absolute.").

due—and that choice, in turn, informs the nature of the restrictions on free speech that may be permissible in a public forum."[124]

The appropriate level of scrutiny depends on whether a statute is content-based or content-neutral.[125] As a general rule, the government cannot impose content-based restrictions on speech.[126] Any such restriction is presumptively invalid, and must be evaluated under strict scrutiny.[127] A content-based law, therefore, will be upheld only if it is "absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end."[128]

Instead of regulating the content of speech, content-neutral restrictions regulate the time, place and manner in which expression may occur. Content-neutral restrictions "are less threatening to freedom of speech because they tend to burden speech only incidentally, that is, for reasons unrelated to the speech's

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[124] *Knights of Columbus*, 272 F.3d at 31 (*citing McGuire I*, 260 F.3d at 42).

[125] *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 32 (1st Cir. 2008) ("A threshold question in cases involving challenges to government restrictions on speech is whether the restriction at issue is content-neutral or, to the contrary, is content-based.").

[126] *McGuire I*, 260 F.3d at 42 (*citing Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994)).

[127] *Id.* at 43 (*citing R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995)).

[128] *Id.* (citing, as examples, *Boos v. Barry*, 485 U.S. 312, 321-29 (1988); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987)).

content or the speaker's viewpoint."[129] As a result, these restrictions are evaluated under the "intermediate" level of scrutiny, and will be upheld if (1) "they are justified without reference to the content of the regulated speech;" (2) "are narrowly tailored to serve a significant governmental interest;" and (3) "leave open ample alternative channels for communication of the information."[130]

B. Content-Based versus Content-Neutral

Plaintiffs argue that the Act constitutes an impermissible content-based restriction on speech. This argument takes two forms. First, Plaintiffs, albeit briefly, urge this court to find that the statute itself is a content-based restriction.[131] Second, in their Complaint, Plaintiffs bring a viewpoint discrimination count,[132] and "courts correctly regard viewpoint discrimination as a particularly pernicious form of content discrimination...."[133]

Alternatively, Plaintiffs argue that the Act is an impermissible time, place and manner regulation.[134]

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[129] *Id.*

[130] *Id.* (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[131] *See, e.g.*, Pls.' Proposed Findings of Fact and Conclusions of Law at 27 ("PFF") [#69].

[132] Compl. at 18-19.

[133] *McGuire I*, 260 F.3d at 48.

[134] *See* Compl. at 15; PFF at 27-32.

Defendant argues that the act is content-neutral and validly regulates the time, place and manner of expressive activity. This court agrees.

1. No Subject Matter Restriction

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[135] Accordingly, "a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched."[136]

Here, as with the 2000 Act, "[b]y addressing political speech on public streets and sidewalks, the Act plainly operates at the core of the First Amendment."[137] But "First Amendment interests nonetheless must be harmonized with the state's need to exercise its traditional police powers."[138] As the First Circuit did in *McGuire I*, for the following reasons, this court "resolve[s] this balance" in favor of the Commonwealth.[139]

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[135] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See also Hill v. Colorado*, 530 U.S. 703, 719 (2000) (*citing Ward*); *Naser Jewelers, Inc.*, 513 F.3d at 32; *McGuire I*, 260 F.3d at 43.

[136] *McGuire I*, 260 F.3d at 43 (*citing Hill*, 530 U.S. at 736; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

[137] *Id.* at 43 (*citing Hague v. CIO*, 307 U.S. 496, 515 (1939)).

[138] *Id.* at 44 (*citing Hill*, 530 U.S. at 714-15).

[139] *Id.*

As noted above, in *Hill v. Colorado*, the Supreme Court considered a Colorado statute that also regulated conduct around reproductive health care facilities.[140] The Court held that the statute was content-neutral for "three independent reasons."[141]

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur.
>
> Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."
>
> Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech....[142]

Here, the 2007 Act is content-neutral for the same three reasons. First, the statute does not directly regulate speech. Indeed, it does not mention speech or ex-

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[140] 530 U.S. at 707.

[141] *Id.* at 719.

[142] *Id.* at 719-720 (footnote omitted and spacing modified).

pression at all, much less prohibit certain types of messages, statements, literature or signage.[143] Instead, and permissibly, "it merely regulates the places *where* communications may occur."[144] Moreover, the statute continues to apply during an RHCF's business hours only, and only if the buffer zone is clearly delineated.[145]

Second, the record clearly demonstrates that the Legislature did not adopt the 2007 Act "because of disagreement with the message it conveys."[146] The Legislature amended the 2000 Act to address continued and serious public safety problems in the areas adjacent to RHCF entrances and driveways, including significant concerns regarding safe patient access to medical services. Relatedly, serious enforcement difficulties with the 2000 Act limited its intended protections and were part of the reason that major public safety concerns continued to exist at RHCFs.

These reasons are entirely "unrelated to disagreement with the underlying message of particular speech."[147] Moreover, as with the 2000 Act, the 2007 Act's "restrictions apply equally to *all demonstrators, regardless of viewpoint*, and the statutory language

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[143] *See id.* at 731 ("As we have already noted, [the statute] simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements.").

[144] *Id.* (emphasis added).

[145] *See* Mass. Gen. Laws ch. 266 § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3); 2008 Guidance Letter at 1-2 (Trial Ex. 26).

[146] *Ward*, 491 U.S. at 791.

[147] *McGuire I*, 260 F.3d at 44.

makes no reference to the content of the speech."[148] Indeed, this "comprehensiveness ... is a virtue ... because it is evidence against there being a discriminatory governmental motive."[149]

Third, as in *Hill*, the statute "advances interests unconnected to expressive content."[150] "As [the Court has] repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech."[151]

Here, as was the case with the 2000 Act, "[t]he Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly."[152] As described above, the investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways. Moreover, major enforcement difficulties with the 2000 Act allowed the problems to persist. Accordingly, as in *McGuire I*, the Act is justified by "conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services," without *any* reference to content.[153]

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[148] *Hill*, 530 U.S. at 719 (emphasis added).

[149] *Id.* at 731.

[150] *McGuire I*, 260 F.3d at 44 (*citing Hill*, 530 U.S. at 719).

[151] *Hill*, 530 U.S. at 720.

[152] *McGuire I*, 260 F.3d at 44.

[153] *Id.*

Focusing on this third reason, the First Circuit explained:

> The critical question in determining content neutrality is not whether certain speakers are disproportionately burdened, but, rather, whether the reason for the differential treatment is—or is not—content-based.... As long as a regulation serves a legitimate purpose unrelated to expressive content, it is deemed content-neutral even if it has an incidental effect on some speakers and not others.... In that event, all that remains is for the government to show that accomplishment of the legitimate purpose that prompted the law also rationally explains its differential impact.[154]

Here, as in *McGuire I*, the Act's goals "justify its specific application to RHCFs."[155] Additionally, "[a]lthough the Act clearly affects anti-abortion protesters more than other groups, there is no principled basis for assuming that this differential treatment results from a fundamental disagreement with the content of their expression."[156] As in *McGuire I*,

> [T]he finding required on these facts is that the legislature was making every effort to restrict as little speech as possible while combating the deleterious secondary effects of anti-abortion protests. Just as targeting medical centers did not render Colorado's counterpart statute content based, ... so too the Act's targeting of

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[154] *Id.* (citations omitted).

[155] *Id.*

[156] *Id.*

> RHCFs fails to undermine its status as a content neutral regulation.[157]

Plaintiffs, however, as the plaintiffs did in *McGuire I*, imply that the Legislature's reasons for amending the Act were pretextual.[158] Additionally, Plaintiffs argue:

> [I]t is only abortion providers and supporters that talk about all these problems that are around the clinics. And they don't do it with respect to facts. They make conclusory allegations.
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> ...
>
> These people would be expected to embellish their testimony because they side with the pro choice viewpoint as opposed to those who oppose abortion.
>
> But when we look at the objective unbiased evidence in the record, there is nothing that supports the zone. The police didn't testify that there was any problem outside the abortion clinics. They didn't say that there was any impeding, any blocking, any harassment, any trespass.[159]

Plaintiffs' arguments fail for two reasons. First, with respect to the Legislature's reasons for amending the statute, Plaintiffs' "insinuations are unsupported by

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[157] *Id.*

[158] *See, e.g.*, Prelim. Bench Trial Transcript at 70-71 ("Mr. DePrimo: Well, that's what they claim their purpose is.").

[159] *Id.* at 72-73 (spacing modified).

any record evidence."[160] Moreover, "where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech."[161]

Second, despite Plaintiffs' claims regarding the evidence before the Legislature, the record is replete with factual references to specific incidents and patterns of problematic behavior around RHCFs. Additionally, nothing in the record suggests that the individuals who testified—under oath—before the Legislature, embellished or were in any way untruthful.

Lastly, although Plaintiffs claim abortion providers and supporters were the only individuals who identified problems, Captain Evans of the Boston Police Department testified with respect to public safety problems outside of the RHCFs and the difficulties with enforcing the 2000 Act. Attorney General Coakley testified regarding the same.

2. Count V. Viewpoint Discrimination[162]

Plaintiffs also argue that the statute constitutes unlawful viewpoint discrimination, because "[t]he fixed buffer statute unjustifiably treats the conduct of the facility employees/agents differently from all other speakers, and the different treatment of conduct results in favor toward pro-choice speakers and disfavor

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[160] *McGuire I*, 260 F.3d at 45.

[161] *Id.*

[162] This Memorandum addresses Plaintiffs' counts by topic, not by their order in the Complaint.

toward all other speakers."[163] Plaintiffs base this claim on the employee/agent exemption in the Act, which exempts from the Act's coverage "employees or agents of such facility acting within the scope of their employment."[164]

This count also fails. First, it is important to note that the Act did not modify any of the exemptions previously established by the 2000 Act, including the employee/agent exemption. Furthermore, the First Circuit specifically addressed and upheld this exemption in *McGuire I* and *McGuire II*, holding that it was content-neutral and did not constitute viewpoint discrimination.[165] Nothing in this case warrants a departure from that analysis and holding.

In *McGuire I*, the plaintiffs' argument suggested that "the sole practical purpose of the employee exemption is to promote a particular side of the abortion debate."[166] In response, the court held, among other things,

> The Massachusetts legislature may or may not have intended the employee exemption to serve the purpose envisioned by the plaintiffs. There are other likely explanations. For example, the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear what al-

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[163] PFF at 40.

[164] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (Trial Ex. 3).

[165] *See McGuire I*, 260 F.3d at 46-48; *McGuire II*, 386 F.3d at 58.

[166] *McGuire I*, 260 F.3d at 46.

> ready was implicit in the Act: that those who work to secure peaceful access to RHCFs need not fear prosecution.[167]
>
> ...
>
> Because we can envision at least one legitimate reason for including the employee exemption in the Act, it would be premature to declare the Act unconstitutional for all purposes and in all applications.[168]

The First Circuit concluded, "The employee exemption ... is neutral on its face, drawing no distinction between different ideologies. And to the extent (if at all) that the exemption contributes to the Act's disproportionate impact on anti-abortion protesters, it can be justified by reference to the state's neutral legislative goals."[169]

Similarly, in *McGuire II*, the court held:

> As we explained in *McGuire I*, so long as a reviewing court can "envision at least one legitimate reason for including the employee exemption in the Act," the law is not facially unconstitutional. *McGuire I*, 260 F.3d at 47. In *McGuire I* this court found there were likely explanations for the exemption other than the desire to favor pro-abortion speech over anti-abortion speech: "For example, the legislature may have exempted clinic workers—just as it exempted police officers—in order to make

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[167] *Id.* at 47.

[168] *Id.*

[169] *Id.* at 48.

> crystal clear ... that those who work to secure peaceful access to RHCFs need not fear prosecution." *Id.* at 47. For this reason given in *McGuire I*, the viewpoint facial attack fails, now as then.[170]

Plaintiffs try to distinguish *McGuire I* and *McGuire II* on the ground that "[t]he rationale employed to uphold the employee/agent exemption of the floating buffer statute does not apply to the fixed buffer zone statute...."[171] Plaintiffs argue:

> Unlike the fixed buffer statute, the floating buffer statute permitted all persons to access any part of the zone so long as they did not make unconsented to approaches from a distance of 6 feet or less, creating a possibility that the zone could become crowded and therefore make navigation by clinic patients difficult.... The same is not true of the fixed buffer statute. Because pro-life advocates and virtually all other persons are excluded from the zone, patients have unhindered and safe passage through the zone to the clinics.[172]

This argument fails for several reasons. First, contrary to Plaintiffs' contention, the rationale advanced in *McGuire I* continues to apply. *In McGuire I*, the court held that the employee exemption served the goals of the 2000 Act "because clinic employees often assist in

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[170] *McGuire II*, 386 F.3d at 58.

[171] PFF at 41. Plaintiffs make this argument as part of their equal protection count, but because it directly implicates the employee/agent exemption, this court addresses it here. The equal protection count fails for independent reasons discussed below.

[172] *Id.*

protecting patients and ensuring their safe passage as they approach RHCFs."[173] As the record reflects, the same is true today. Accordingly, "[s]ince it is within the scope of their employment for clinic personnel to escort patients in this fashion, and since a primary purpose of the law is to facilitate safe access, the employee exemption serves the basic objectives of the Act."[174]

Additionally, "[t]o cinch matters, the legislature could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners—a datum that the *Hill* court recognized as justifying the statute there."[175] As with the 2000 Act, the legislature likely concluded the same thing here when deciding to maintain the exemption.

Second, even assuming that the rationale applies with less weight here than with the 2000 Act—contrary to the position of this court—as long as there is "one legitimate reason for including the employee exemption in the Act," the law is not facially unconstitutional.[176] In addressing the identical employee/agent exemption, the *McGuire I* court found "other likely explanations for the exemption," and gave the example cited twice above. The same example applies here: "the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear ... that those who work to secure peaceful access to

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[173] *McGuire I*, 260 F.3d at 46.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 47; *McGuire II*, 386 F.3d at 58 (*citing McGuire I*, 260 F.3d at 47). As noted above, the First Circuit emphasized this point in both *McGuire* cases.

RHCFs need not fear prosecution."[177] Accordingly, there is "at least one legitimate reason for including the employee exemption in the Act, [and] it would be premature to declare the Act unconstitutional for all purposes and in all applications."[178]

Plaintiffs also argue, "Whether or not by design, the fixed buffer statute allows escorts with pro-choice viewpoints to express their views in the zone while prohibiting most other persons from expressing their views in the zone."[179]

This argument also fails, at least on this facial challenge.[180] On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone:[181]

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[177] *McGuire I*, 260 F.3d at 47; *McGuire II*, 386 F.3d at 58 (*citing McGuire I*, 260 F.3d at 47). *See also McGuire I*, 260 F.3d at 46 (Holding that "testimony taken before the state senate indicates beyond cavil that the employee exemption will promote the Act's goals because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs.").

[178] *McGuire I*, 260 F.3d at 47.

[179] PFF at 41.

[180] If "experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy ... [,]" Plaintiffs may present this argument during the as-applied challenge. *McGuire I*, 260 F.3d at 47.

[181] Although this is a facial challenge, this court may properly consider the Attorney General's enforcement position. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a

> The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.[182]

This approach is consistent with the Attorney General's past interpretation of the exemption,[183] an approach the District Court and the First Circuit cited with approval in *McGuire II*.[184] As with the 2000 Act, the Attorney General's current position "require[s] evenhanded enforcement of its prohibitions, even against clinic employees and agents...."[185] It is "one very likely interpretation of the exemption's language," and "is clearly a proper, content-neutral way of interpreting the exemption."[186]

For these reasons, the employee exemption does not discriminate based on viewpoint, and Count V of Plaintiffs' Complaint fails.

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state court or enforcement agency has proffered.") (*citing Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (*quoting Hoffman Estates*, 455 U.S. at 494 n.5).

[182] 2008 Guidance Letter at 2 (Trial Ex. 26).

[183] *See supra* Factual Findings § D.

[184] *See McGuire II*, 386 F.3d at 65-66; *McGuire v. Reilly*, 271 F. Supp. 2d 335, 341 (D. Mass. 2003). *See also supra* Factual Findings § E.

[185] *McGuire v. Reilly*, 271 F. Supp. 2d at 341.

[186] *McGuire II*, 386 F.3d at 64.

3. Conclusion Regarding Content Neutrality

On its face, the 2007 Act is a content-neutral time, place and manner restriction, and the employee exemption does not constitute viewpoint discrimination. Accordingly, this court evaluates the Act using intermediate scrutiny.

C. Count I. Time, Place and Manner Restriction

Time, place and manner regulations will be upheld if (1) "they are justified without reference to the content of the regulated speech;" (2) "are narrowly tailored to serve a significant governmental interest;" and (3) "leave open ample alternative channels for communication of the information."[187] Here, the Act meets all three prongs of the test.

1. Justified Without Reference to Content of Regulated Speech

As explained above, the statute is justified without any reference to the content of regulated speech. The Act's purpose is "to increase forthwith public safety at reproductive healthcare facilities,"[188] by protecting public safety in the areas adjacent to RHCF entrances and driveways, and ensuring safe patient access to medical services.[189] "The interests that underlie these

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[187] *McGuire I*, 260 F.3d at 43 (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[188] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)). (Trial Ex. 1)[#36].

[189] The Commonwealth's public safety goal is furthered by the statute's attempt to eliminate the enforcement difficulties with the 2000 Act's floating zone. As noted, these difficulties limited

purposes are firmly rooted in the state's traditional police powers, and these are precisely the sort of interests that justify some incidental burdening of First Amendment rights."[190]

2. Narrowly Tailored

The Supreme Court has repeatedly held that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[191] Instead, a law is narrowly tailored if it " 'promotes a substantial government interest that would be achieved less effectively absent the regulation,' "[192] and "does so without burdening substantial-

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the 2000 Act's intended protections and were part of the reason that major public safety concerns persisted at RHCFs.

[190] *McGuire I*, 260 F.3d at 48 (*citing Hill*, 530 U.S. at 715 (noting the "enduring importance of the right to be free from persistent importunity, following and dogging after an offer to communicate has been declined") (citation and internal quotation marks omitted)); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997) (extolling the significance of "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73 (1994) ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

[191] *Ward*, 491 U.S. at 798.

[192] *Id.* at 799 (*quoting U.S. v. Albertini*, 472 U.S. 675, 689 (1985)).

ly more speech than is necessary to further this goal."[193]

As long as this test is satisfied, a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[194] "Put another way, the validity of time, place, or manner regulations is not subject to 'a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.' "[195]

Lastly, this court "must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary."[196] "States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places," and the Supreme Court has recognized "the unique concerns that surround health care facilities...."[197]

Here, the Commonwealth has a substantial and legitimate content-neutral interest in protecting public

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[193] *McGuire I*, 260 F.3d at 48 (*citing Ward*, 491 U.S. at 799). *See also Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 30 (1st Cir. 2008) (*citing Ward*, 491 U.S. at 799).

[194] *Ward*, 491 U.S. at 800; *Naser*, 513 F.3d at 35 (*citing Ward*, 491 U.S. at 800).

[195] *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004) (*citing Ward*, 491 U.S. at 800) (internal citations and quotation marks omitted).

[196] *Hill*, 530 U.S. at 728 (*quoting Madsen*, 512 U.S. at 772).

[197] *Id.*

safety at RHCF entrances and driveways, because "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens."[198] The Commonwealth also has a legitimate, content-neutral interest in providing "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."[199] Indeed, Plaintiffs appear to acknowledge the importance of this interest: "[I]t appears the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services. This is a legitimate interest."[200] Additionally, at the Bench Trial, Plaintiffs noted: "In this particular case the legitimate sweep is what? It is clearing out the bottleneck ... immediately adjacent to the doors and to the driveways. Certainly blocking, impeding, trespass is actually a significant interest. That's a legitimate interest of the government."[201]

Having found qualifying governmental interests, this court now determines that the law is narrowly tailored to serve those interests. Despite the passage of the 2000 Act, the Commonwealth faced significant pub-

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[198] *Hill*, 530 U.S. at 715 (internal citations and quotation marks omitted).

[199] *Id.* (*citing Madsen*, 512 U.S. 753; *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979)). *See also id.* at 728 ("Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.").

[200] PFF at 34 (*citing McGuire I*, 260 F.3d at 44).

[201] Prelim. Bench Trial Transcript at 76.

lic safety problems in the areas adjacent to RHCF entrances and driveways, including serious concerns regarding safe patient access to medical services. As a result, following an investigation, the Legislature reasonably concluded that the 2000 Act's floating buffer zone was insufficient,[202] and determined that a 35-foot fixed buffer zone was immediately necessary to protect public safety and ensure patient access to clinics. Accordingly, based on the record before the Legislature and the record before this court, promoting these public safety interests would be achieved less effectively without the fixed-buffer zone law.

Additionally, the law does not burden substantially more speech than necessary to further these public safety goals. Again, "the government is not required to choose the least restrictive approach in content-neutral regulation."[203] Here, the Legislature appears to have carefully considered and balanced the Act's effects on speech with the Commonwealth's legitimate governmental interests. The result was a 35-foot fixed buffer zone that targeted the problematic areas (areas immediately adjacent to RHCF entrances and driveways), during the problematic times (an RHCF's business hours).

Furthermore, the Supreme Court and other federal courts have upheld several fixed zones as "narrowly tailored" under the First Amendment. For example, in *Madsen*, the Court upheld part of an injunction that

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[202] *See, e.g., McGuire I*, 260 F.3d at 49 (holding that "[t]he Massachusetts legislature reasonably concluded that *existing law inadequately addressed* the public safety, personal security, traffic, and health care concerns created by persistent demonstrations outside RHCFs.") (emphasis added).

[203] *Naser*, 513 F.3d at 36.

created a 36-foot fixed buffer zone around an RHCF's entrances and driveway.[204] Also, in *Schenck*, the Court upheld an injunction that created a 15-foot fixed buffer zone around RHCF entrances, doorways and driveways.[205]

On the record before this court, like in *Schenck*, this court finds that the fixed buffer zone is "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so,"[206] which directly furthers the public safety and access goals of the Commonwealth. As in *Madsen* and *Schenck*, "the record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots."[207] As such, the Legislature "was entitled to conclude that the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and "the only way to ensure access was to move all protesters away from the doorways."[208]

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[204] *See Madsen*, 512 U.S. 753. The Court invalidated other aspects of the injunction, including the 36-foot buffer zone as applied to certain private property surrounding the clinic. *See id.* at 776.

[205] *See Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997).

[206] *Id.* at 380.

[207] *Id.*

[208] *Id.* at 380-381 (emphasis in original). Similarly, as this court noted at the Bench Trial, "the government has the right to neutralize a certain amount of property." Prelim. Bench Trial Transcript at 79.

Lastly, the exact size of the buffer zone is not a choice for this court to make.[209] Maybe the Legislature's concerns warranted a slightly larger buffer zone, or maybe the Legislature could have accomplished its objectives with a slightly smaller zone. It is the view of this court, however, considering all of the evidence before the Legislature and this court, the Legislature's choice of 35 feet was a reasonable one under the circumstances, and one that was narrowly tailored to promoted the Commonwealth's substantial and legitimate interests.

i. **Note: Plaintiffs' Challenges to Legislature's Evidence**

Plaintiffs argue that the Legislature based the 2007 Act on outdated evidence that preceded the passage of the 2000 Act.[210] This argument carries no weight.

First, virtually all of the evidence presented to the Legislature in 2007 addressed the public safety situation in the years *following* the enactment of the 2000 Act, including information from the then-recent past. This cannot be considered stale by any means.

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[209] Again, "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800 (internal citations and quotation marks omitted). Additionally, "Courts owe legislative judgments substantial respect and, as a general matter, should be reluctant ' "to reduce statutory language to a merely illustrative function." ' " *McGuire I*, 260 F.3d at 47 (*quoting Mass. Ass'n of HMO v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999)).

[210] *See, e.g.*, Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 48 (characterizing the evidentiary record as "stale").

Second, based on the record before this court, the post-2000 Act evidence formed the primary basis for the Legislature's adoption of the 2007 Act.

Third, the Legislature may certainly "make use of past experience," as long as "the degree to which inferences drawn from past experience are plausible."[211] Here, to the extent the Legislature considered the Commonwealth's history of public safety problems at RHCFs, it was reasonable to do so, particularly because the "past experience" derived from a relatively recent time frame. Indeed, this would be expected prior to the passage of most public safety laws. Additionally, it was plausible and reasonable for the Legislature to infer from past experiences at RHCFs that these problems would continue unless the 2000 Act was passed.

Plaintiffs also argue that nothing in the record supports creation of the fixed zone. According to Plaintiffs: "There is no evidence that anything happened between 2000 and 2007 that warranted the increase in the size of the buffer zone or even the fixed buffer zone but for the fact that the police were having difficulty in enforcing it. That's it."[212]

Similarly, Plaintiffs claim:

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[211] *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004). Indeed, Plaintiffs acknowledged this at the Bench Trial. *See* Prelim. Bench Trial Transcript at 38 ("In *Bl(a)ck Tea Society* the First Circuit said that the government can consider past experiences but, I mean, there has to be a fairly reasonable nexus, a plausible nexus between what happened in the past and what's happened in the future.").

[212] Prelim. Bench Trial Transcript at 39.

> The police didn't testify that there was any problem outside the abortion clinics. They didn't say there was impeding, any blocking, any harassment, any trespass.
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> The police are there all the time. That's the testimony in the record. They're there all the time and they didn't see any of the problems that these abortion providers and supporters saw.
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> Nothing in the record with respect [to] arrests and convictions.
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> ...
>
> Well, if these things are happening, Judge, why aren't the people who were actually violating the law being prosecuted? And if they're being prosecuted, why are there no convictions? There are no arrests and no convictions in the record with respect to unlawful conduct.
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> ...
>
> My point is is the lack of arrests and the law of convictions are showing that the illegal unlawful behavior isn't occurring in the first place.[213]

These arguments echo Plaintiffs' claims in the "content-based" versus "content-neutral" debate, and the response is the same. Contrary to Plaintiffs' contentions, the record contains numerous and specific factual references to continued public safety problems around RHCFs in the years following the passage of the 2000 Act, including impeded access, blocking and harass-

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[213] *Id.* at 73-74 (spacing modified).

ment. All of this evidence went well beyond difficulties in enforcing the 2000 Act.

Furthermore, although Plaintiffs claim that only RHCF employees and supporters identified problems, Captain Evans of the Boston Police Department testified about public safety problems outside of the RHCFs. Attorney General Coakley also testified. Moreover, nothing in the record supports Plaintiffs' implication that RHCF employees and supporters embellished or fabricated their testimony.

Additionally, as explained above, police and district attorneys *tried* to prosecute violations of the 2000 Act, but encountered significant difficulty; and the low number of arrests for violations was due to the difficulty of enforcing the law, not a lack of problematic conduct.

Lastly, although the 2007 Act mainly—if not entirely—responds to an existing public safety and law enforcement problem, the Legislature may certainly take a preventative approach to lawmaking. Indeed, in this case, "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."[214]

ii. Note: Plaintiffs' Conduct

Plaintiffs note that their conduct at RHCFs is peaceful, and that they do not block, impede or harass patients or pedestrians.[215] If this case involved an in-

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[214] *Hill*, 530 U.S. at 729.

[215] *See, e.g.*, Decl. of Eleanor McCullen at 2, 4 (Trial Ex. 4); Decl. of Jean Blackburn Zarrella at 2-3 (Trial Ex. 5); Decl. of Car-

junction directed at Plaintiffs, the lawfulness and character of their behavior would be important. At this time, however, this court is evaluating a facial challenge to a statute of general application. Accordingly, Plaintiffs' specific conduct is largely, if not entirely, irrelevant to the present analysis.[216]

3. Ample Alternative Channels

i. Alternative Channels

The law also satisfies the final requirement, because it leaves open ample alternative avenues of communication.[217] First, there are important prerequisites for the Act to apply at a particular RHCF: the buffer zone must be clearly marked and posted, and is only enforceable during the normal business hours of the clinic.[218] Additionally, when in effect, the Act only applies within 35-foot radii of RHCF entrances and driveways, not around the entire property line.[219]

Furthermore, as long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely

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mel Ferrell at 2-3 (Trial Ex. 6); Decl. of Eric Cadin at 2-3 (Trial Ex. 7); PFF at 3-4.

[216] Moreover, this court does not have a complete record on such conduct.

[217] Plaintiffs may try to establish otherwise during their as-applied challenge, but this court cannot make such a finding on this facial challenge.

[218] Mass. Gen. Laws ch. 266, § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3).

[219] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (emphasis in original) (Trial Ex. 1)[#36].

talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.[220]

ii. Plaintiffs' Approach Argument

Plaintiffs argue that "[t]he First Amendment protects the right of speakers to communicate with their intended audience from a normal conversational distance, and distances of 15 feet or more do not, as a matter of law, allow for normal conversation."[221]

The Supreme Court, however, has repeatedly upheld fixed buffer zones that have the effect of limiting normal conversation within the zone. For example, in *Madsen* and *Schenck*, respectively, the Court upheld 36-foot and 15-foot fixed buffer zones around RHCF entrances and driveways.[222]

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[220] *See, e.g., Madsen*, 512 U.S. at 770 ("Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots."). Plaintiffs may try to establish otherwise during their as-applied challenge, but there is no basis for such a finding at the facial challenge stage.

[221] PFF at 29.

[222] *Madsen*, 512 U.S. at 768-71; *Schenck*, 519 U.S. at 374-76. Likewise, albeit in a different context, the Court upheld a 100-foot fixed "campaign free" zone around polling places. *See Burson v. Freeman*, 504 U.S. 191, 210-11 (1992).

Plaintiffs, however, urge that *Schenck* supports their position. There, the Court addressed both a floating and a fixed buffer zone. The floating zone required all protesters to stay at least 15 feet away from any individual or vehicle seeking access to or leaving an RHCF, regardless of the person or vehicle's location.[223] The fixed buffer zone prohibited "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities."[224]

The Court observed that the floating buffer zone "prevented defendants ... from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks," and that this was a "broad prohibition, both because of the type of speech that is restricted and the nature of the location."[225] But, "[o]n the other hand, we have before us a record that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct. In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[226]

The Court, however, declined to decide "whether the governmental interests involved would ever justify some sort of zone of separation between individuals en-

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[223] *See Schenck*, 519 U.S. at 366.

[224] *Id.* (internal quotation marks omitted).

[225] *Id.* at 377.

[226] *Id.*

tering the clinics and protesters, measured by the distance between the two."[227] Instead, the Court held that "because this broad prohibition on speech 'floats,' it cannot be sustained on this record."[228] The Court explained:

> [I]t would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits. That is, attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message—certainly protected on the face of the injunction—will be hazardous if one wishes to remain in compliance with the injunction.[229]

Significantly, however, the Court *upheld* the 15-foot fixed buffer zone around RHCF entrances and driveways[230] even though the effect on conversation was similar.

Here, the buffer zone is fixed, not floating. Accordingly, the Court's concern regarding the uncertainty that attaches to a floating zone disappears. A fixed

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[227] *Id.*

[228] *Id.*

[229] *Id.* at 378 (internal citations omitted).

[230] *Id.* at 380-81 ("We uphold the fixed buffer zones around the doorways, driveways, and driveway entrances. These buffer zones are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so....").

zone provides a bright-line rule for violations: if you are a non-exempt person in the zone, you are violating the Act.[231] Moreover, as discussed in the narrowly tailored analysis, this court finds that the substantial governmental interests involved here justify the creation of the 35-foot fixed buffer zone.

Additionally, although the Supreme Court cases control the holding here, this court briefly notes the First Circuit's decision in *Bl(a)ck Tea Society v. City of Boston*.[232] There, the First Circuit considered and upheld the establishment of a "designated demonstration zone" for the 2004 Democratic National Convention.[233]

The designated zone "allowed no opportunity for physical interaction (such as the distribution of leaflets) and severely curtailed any chance for one-on-one conversation."[234] The court held, however, among other things, that "although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access."[235]

The same applies here. Although slightly closer physical interaction may partially enhance one's ability

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[231] This also provides the police with clear guidelines for enforcing the law.

[232] 378 F.3d 8 (1st Cir. 2004).

[233] *Id.* at 10.

[234] *Id.* at 13.

[235] *Id.* at 14.

to sidewalk counsel RHCF patients, there is no constitutional right to that level of particularized access.

4. Conclusion Regarding Time, Place and Manner Restriction

For the foregoing reasons, this court finds that the 2007 Act (1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve significant governmental interests; and (3) leaves open ample alternative channels for communication. Accordingly, the Act is a lawful time, place and manner restriction, and Defendant prevails on Count I of Plaintiffs' Complaint.

D. Note on Public Forum Doctrine

Although Plaintiffs do not press a separate public forum challenge, Plaintiffs correctly note that sidewalks and streets are " 'quintessential' public forums."[236] Plaintiffs also dedicate a section of their brief to the subject of free speech on public streets and sidewalks.[237] Accordingly, this court will conduct a separate public forum analysis.

Governments can regulate public forums if the restrictions meet the appropriate level of scrutiny. As noted, while content-based regulations must survive

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[236] *See* PFF at 18 (*citing Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *United States v. Grace*, 461 U.S. 171, 179 (1983)).

[237] *See* "The Nature of Public Streets and Sidewalks," *id.* at 18-19; "Free Speech on Public Streets and Sidewalks," *id.* at 20-22.

strict scrutiny,[238] content-neutral time, place and manner restrictions must pass intermediate scrutiny.[239]

Here, the Act clearly can affect sidewalks and streets in the vicinity of RHCFs, and is thereby subject to the public forum doctrine. For the reasons above, however, the Act is content-neutral, time, place and manner regulation. Accordingly, intermediate scrutiny applies, and this court has already held that the Act passes this level of scrutiny. The Act, therefore, also survives a separate public forum challenge.

E. Count II. Overbreadth Challenge

Plaintiffs also assert that the Act is overbroad because it burdens more speech than is necessary to achieve a substantial and legitimate government interest. There are two main parts to this argument. First, Plaintiffs argue that the "statute bans from the zone all types of speech ... and all manner of speech ... not only the abortion-related speech ....[,]"[240] and the government's interest is not served by such a broad ban.[241] Second, Plaintiffs argue that the statute unconstitutionally burdens personal liberty interests, because it "prohibits virtually all persons from standing in or uti-

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[238] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

[239] *Id.* ("The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

[240] PFF at 33.

[241] *See id.* at 35-36.

lizing the zone for any and all purposes other than 'reaching a destination other than such facility.' "[242]

The Supreme Court rejected similar arguments in *Hill v. Colorado*, and the Court's analysis applies with equal weight here. There, the Court held, "The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute."[243] Here, all persons entering and exiting the health care facilities share the legitimate health and safety interests served by the Act.

Furthermore, as noted in the content-neutral discussion, the Act's "comprehensiveness ... is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive."[244] Indeed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[245]

Additionally, as already noted, the Act "simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It mere-

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[242] *See id.* at 34 (*quoting* Mass. Gen. Laws ch. 266, § 120E1/2(b) (2007)).

[243] *Hill*, 530 U.S. 703, 730-31 (2000).

[244] *Id.* at 731.

[245] *Id.*

ly regulates the places where communications may occur."[246]

Addressing Plaintiffs' overbreadth argument more generally, "a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[247] The Court, however, "vigorously enforce[s]" the substantiality requirement, "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[248] Additionally, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.' "[249]

On the record before this court on Plaintiffs' facial challenge, Plaintiffs have not established that "the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counsel-

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[246] *Id.*

[247] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 n.6 (2008) (*citing New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (internal citations and quotation marks omitted)). *See also Hill*, 530 U.S. at 732 (" 'particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' ") (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[248] *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (*citing Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick*, 413 U.S. at 615).

[249] *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (*quoting Broadrick*, 413 U.S. at 613). *See also Williams*, 128 S. Ct. at 1838; *Wash. State Grange*, 128 S. Ct. at 1191 n.6.

ing."[250] "Like [Plaintiffs'] own activities, the conduct of other protesters and counselors at all health care facilities are encompassed within the statute's 'legitimate sweep.' "[251] Accordingly, Count II must fail.

F. Count III. Prior Restraint

Plaintiffs also assert that the Act constitutes an impermissible prior restraint on speech in violation of the First and Fourteenth Amendments. The Act, however, is not a prior restraint, because the Commonwealth "has not sought to prevent speech, but, rather, to regulate the place and manner of its expression."[252] Indeed, "The Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner restrictions as prior restraints," including in *Hill*, *Schenck* and *Madsen*, "and those cases are controlling here."[253] As cautioned by the First Circuit, "If content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in the time-place-manner jurisprudence would be eviscerated."[254]

Accordingly, Count III of Plaintiffs' Complaint fails.

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[250] *Hill*, 530 U.S. at 732.

[251] *Id.*

[252] *Bl(a)ck Tea Society*, 378 F.3d 8, 12 (1st Cir. 2004).

[253] *Id.* (*citing Hill*, 530 U.S. at 733-34; *Schenck*, 519 U.S. at 374 n.6; *Madsen*, 512 U.S. at 763 n.2).

[254] *Id.*

G. Count IV. "Free Speech—Free Association—Free Exercise Hybrid"

Plaintiffs also argue that "the Act implicates rights to free speech, free assembly, free association and free exercise of religion,"[255] and that "[i]nfringement of the right to free exercise of religion exercised in combination of other fundamental constitutional rights subjects the Act to strict scrutiny review."[256] This court will first address each of these rights individually.

1. Free Exercise Claim

"The Free Exercise Clause also is made applicable to the states (and, therefore, to municipalities) through the Fourteenth Amendment."[257] The clause states that "Congress shall make no law ... prohibiting the free exercise [of religion] ...."[258] If, however, " 'a law ... is neutral and of general applicability,' " it " 'need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.' "[259]

Here, this court has already determined that the Act is a generally-applicable, content-neutral statute that passes intermediate scrutiny. The Act does not regulate speech, expression, prayer, singing, worship

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[255] Pl. Mem. of Law in Supp. of Mot. for Prelim. Inj. at 39.

[256] Compl. at 18.

[257] *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir. 2001) (*citing Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

[258] U.S. Const. Amend. I.

[259] *Knights of Columbus*, 272 F.3d at 35 (*quoting Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)).

or display of religious articles. It merely regulates where such expression may take place, i.e., outside of a clearly marked buffer zone during the normal business hours of an RHCF. The Act also applies to all non-exempt persons equally. As a result, this court is "bound to conclude that the regulation does not discriminate against a particular religion or religious practice."[260] Accordingly, as a matter of law, Plaintiffs "cannot rewardingly invoke the Free Exercise Clause in their attack on the regulation."[261]

2. Freedom of Speech

This court has already determined that the Act is a lawful, content-neutral time, place and manner restriction; is not overbroad; and does not constitute a prior restraint. Accordingly, Plaintiffs' free speech claim fails.

3. Freedom of Assembly and Association

The Supreme Court has held, "Regulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[262]

Here, the Act does not impose a "severe" burden on a protester's right to assemble or associate. As noted above, the Act permits ample alternative channels of

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[260] *Id.*

[261] *Id.*

[262] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal citations and quotation marks omitted).

communication, because, among other things, individuals are free to demonstrate and associate outside the buffer zone. Moreover, for the reasons above, the Commonwealth's interests are of sufficient importance to justify the 35-foot fixed buffer zone. Accordingly, the Act does not violate the First Amendment's right to associate or assemble peaceably.

4. No Hybrid Cause of Action

All of Plaintiffs' First Amendment individual claims fail, leaving Plaintiffs' "hybrid" cause of action. Again, Plaintiffs argue that "heightened review applies when free exercise rights are infringed in combination with other fundamental constitutional rights."[263]

Although the First Circuit has yet to decide the "hybrid rights" issue definitively,[264] this court declines

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[263] Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 39. Plaintiffs base this count on *Employment Div., Dept. of Human Resources of Oregon v. Smith*, where the Court observed, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press...." 494 U.S. 872, 882 (1990), *rehearing denied*, 496 U.S. 913 (1990) (subsequent history omitted).

[264] *See Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008) (declining to "enter[] the fray over the meaning and application of *Smith*'s 'hybrid situations' language"). The court did, however, note that "[n]o published circuit court opinion, including *Brown [v. Hot, Sexy & Safer Productions*, 68 F.3d 525 (1st Cir. 1995)], has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." *Id.* at 98. Additionally, "[o]ther circuits have held explicitly that *Smith* does not create a new category of hybrid claims." *Id.*

to apply strict scrutiny to the instant case.[265] After reviewing all of Plaintiffs constitutional claims on an individual basis and finding no violation, this court will not engage in multiplication theory. Notwithstanding the Supreme Court's dicta in *Smith*,[266] there is no basis in the Constitution for heightening the level of review simply based on the number of rights asserted or implicated in a case.[267] Either a plaintiff has a constitutional claim or she does not.[268]

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[265] The court has already held that the Act passes intermediate scrutiny.

[266] The Court's observation was incidental and unnecessary to the outcome of the case. Indeed, the Court specifically acknowledged, "The present case does not present such a hybrid situation." *Smith*, 494 U.S. at 882. Accordingly, the comment is dicta and non-binding. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) ("We have held, by contrast, in the context of claims involving free exercise and free speech, that *Smith*'s 'language relating to hybrid claims is dicta and not binding on this court.' ") (*quoting Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)). This court also does not believe that the statement rises to the level of a "carefully considered statement" recognized by the First Circuit as controlling precedent. *See United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993).

[267] *See, e.g., Leebaert*, 332 F.3d at 144 ("We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated. Therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard to evaluate hybrid claims.") (internal citations and quotation marks omitted); *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights."). *See also Hialeah*, 508 U.S. at 567 (Souter, J., concurring) ("[T]he distinction *Smith* draws strikes me as ultimately untena-

Accordingly, Count IV of the Complaint also fails.

Discussion: Count VIII. Equal Protection Challenge

Plaintiffs also assert that the employees/agents exemption of the Act violates the Equal Protection

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ble. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

[268] This court notes, however, that even assuming the existence of a "hybrid rights" doctrine, Plaintiffs' "hybrid" claim would still fail. Under the doctrine, a plaintiff must still establish an independently viable constitutional violation, or at least a "colorable" associated claim. *See, e.g., Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) ("Based on the analyses of Appellants' speech, assembly, and equal protection claims that follow, however, we find them individually lacking the merit necessary to withstand summary judgment.... Appellants have identified no constitutionally protected interest upon which the [statute] infringes, as they must in order to establish a hybrid rights claim requiring heightened scrutiny."); *EEOC v. Catholic University of America*, 83 F.3d 455, 467 (D.C. Cir. 1996) (acknowledging a "hybrid situation," but finding no independently viable constitutional claim). *See also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1148 (9th Cir. 2000) (characterizing *EEOC* as "requiring that a free exercise claim based on the hybrid rights exception must include an independently viable claim of infringement of a companion right"). For the "colorable" claim requirement, see, for example, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) (explaining that "hybrid rights exception" requires a "colorable independent constitutional claim"). Here, for the reasons above, Plaintiffs have not established either. Accordingly, any "hybrid" claim would fail.

Clause. As such, Plaintiffs argue that the Act "impinges fundamental rights and liberty interests and therefore is subject to strict scrutiny review."[269] This court's other holdings regarding the Act, however, and the case law, foreclose such an argument.

"From time to time, the Supreme Court has invoked equal protection rather than free speech, as the basis for invalidating a content-based speech restriction."[270] "But where the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily passes the rational basis test employed under the Equal Protection Clause."[271]

Here, as discussed above, the exemption is content-neutral and there are satisfactory rationales for the exemption. Accordingly, "the Act passes muster under the Equal Protection Clause for the same reasons that it passes muster under the First Amendment."[272]

Furthermore, as explained above, intermediate scrutiny applies, not strict scrutiny.[273] Because this court has already held that the Act survives intermediate scrutiny, Count VIII of Plaintiffs' Complaint also fails.

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[269] Compl. at 22.

[270] *McGuire I*, 260 F.3d at 49.

[271] *Id.* at 49-50.

[272] *Id.* at 50.

[273] *See, e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 32-33 (1st Cir. 2007) ("Unlike regulations that are not content-neutral, which are reviewed under a harsher strict-scrutiny standard, ... content-neutral regulations are reviewed under so-called intermediate scrutiny.").

Discussion: Due Process Challenges

A. Count VI. Vagueness

1. Plaintiffs' Position

Plaintiffs argue that the Act is unconstitutionally vague because of one of the Act's exemptions.[274] Exemption four excludes from the Act's coverage "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility."[275]

Plaintiffs find two words of the exemption problematic. First, Plaintiffs argue that "solely" is unclear, "because there are often multiple reasons for persons to travel from one place to another."[276] Second, Plaintiffs argue that "destination" is unclear, "because a person need not have a destination as a reason to use a public sidewalk."[277]

Plaintiffs also argue that "it is unclear whether the statute permits plaintiffs to walk through the zone carrying a sign, or wearing a t-shirt or hat with an abortion-related or partisan message."[278] According to Plaintiffs, "Based on the Attorney General's guidance letter, it appears they cannot," because, "[a]s construed by the Attorney General, the term 'partisan speech' is

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[274] *See* Compl. at 19-20; PFF at 42-43.

[275] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (spacing modified) (Trial Ex. 3).

[276] PFF at 42.

[277] *Id.* at 43.

[278] *Id.*

undefined, forcing a person to guess about the conduct proscribed."[279]

2. Attorney General's Guidance

As noted above, the Attorney General's 2008 Guidance Letter addresses all of the exemptions, including the fourth:

> Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).[280]

3. Legal Standard for Vagueness

The Due Process Clause of the Fifth Amendment " 'mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be prohibited

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[279] *Id.*

[280] 2008 Guidance Letter at 3 (Trial Ex. 26).

with sufficient specificity to forewarn of the proscription of said conduct.' "[281] Accordingly, " '[a]s generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' "[282]

"The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague."[283] Indeed, " 'Many statutes will have some inherent vagueness.... Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.' "[284]

Lastly, as acknowledged by Plaintiffs,[285] "[i]n evaluating a facial challenge to a state law, a federal court

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[281] *United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004) (*quoting United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985)).

[282] *Id.* at 56 (*quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983) and *citing Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964)). *See also United States v Williams*, 128 S. Ct. 1830, 1845 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.").

[283] *Id.*

[284] *Id.* (*quoting Rose v. Locke*, 423 U.S. 48, 49-50 (1975)).

[285] *See* PFF at 18.

must, of course, consider any limiting construction that a state court or enforcement agency has proffered."[286]

4. Vagueness Standard Applied

Reading the statute "as a whole,"[287] this court finds the exemption to be clear on its face. "Solely," meaning "to the exclusion of all else,"[288] should not confuse a person of ordinary intelligence.[289] The exemption applies if an individual walks through the zone with the sole purpose of walking home or to work or to the store. Additionally, if a counselor or protester decides to walk through the zone with the *sole* purpose of getting to the other side, the exemption applies. What the statute prohibits is walking through the zone with the purpose of engaging in an activity *other than* reaching the other side. This would clearly not be passing through the zone "to the exclusion of all else."

Moreover, the word "destination," meaning "the place to which one is journeying,"[290] is also clear. Plaintiffs disagree, and argue, as an example, that a person jogging or strolling does not necessarily have a destination. This argument is unpersuasive. A jogger's destination is to the end of his run, which may be at the end

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[286] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.5 (1982) (*citing Grayned*, 408 U.S. at 110). *See also McGuire II*, 386 F.3d at 58 (internal citations and quotation marks omitted).

[287] *See Schenck v. Pro-Choice Network*, 519 U.S. 357, 383 (1997) (*citing Grayned*, 408 U.S. at 110).

[288] *Merriam-Webster's Collegiate Dictionary* 1114 (Definition 2) (10th ed.2000).

[289] *Williams*, 128 S. Ct. at 1845.

[290] *Id.* at 314 (Definition 3).

of the block or in the next neighborhood. Indeed, for purposes of the exemption, any destination is fine, so long as it is not in the middle of a clearly marked buffer zone during an RHCF's business hours. Even the aimless stroller has a likely destination in mind before she turns around. In any event, the word is sufficiently clear for ordinary people to understand.

Furthermore, even assuming that the exemption requires some degree of explanation, the Attorney General's interpretation eliminates any possible confusion.[291] Not only is the Attorney General's construction reasonable, it comports with a common sense and plain read of the language.

Also, despite Plaintiffs' contention, the Attorney General's guidance is clear. The 2008 Guidance Letter states, "an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech)."[292]

Although Plaintiffs claim to be confused by this, displaying signs or shirts with abortion-related or partisan messages clearly qualifies as "expressing their views about abortion," which counts as "do[ing] any-

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[291] Again, although this court considers the statute clear on its face, "[t]he mere fact that a statute ... requires interpretation does not render it unconstitutionally vague." *Lachman*, 387 F.3d at 56.

[292] 2008 Guidance Letter at 2 (Trial Ex. 26).

thing else within the buffer zone."[293] As such, the Attorney General's interpretation specifically prohibits this type of conduct.[294] After all, if individuals could simply walk back and forth all day in the buffer zone engaging in various activities, the main goals of the statute—ensuring public safety and guaranteeing unimpeded and safe access for patients—would be severely frustrated.

Contrary to Plaintiffs' assertion, the phrase "partisan speech" is also not vague such that an ordinary person is "forc[ed] ... to guess about the conduct proscribed."[295] An ordinary person understands "partisan" as support for political party or cause. The formal definition is also consistent with the contemporary use of the word: when used as an adjective, "partisan" means embodying "a firm adheren[ce] to a party, faction, cause or person."[296] Especially when used in the context of "abortion ... or other partisan speech,"[297] an ordinary person would understand that the provision refers to political or cause-related speech. Accordingly, this provides people of ordinary intelligence a reasona-

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[293] *Id.*

[294] Indeed, and despite their alleged confusion, Plaintiffs appear to acknowledge as such: "On its face, it is unclear whether the statute permits plaintiffs to walk though the zone carrying a sign, or wearing a t-shirt or hat with an abortion-related or partisan message. *Based on the Attorney General's guidance letter, it appears they cannot.*" PFF at 43 (emphasis added).

[295] *Id.*

[296] *Merriam-Webster's Collegiate Dictionary* 845 (Definition 1).

[297] 2008 Guidance Letter at 2 (Trial Ex. 26).

ble opportunity to understand which type of conduct is prohibited.

Moreover, the Attorney General's interpretation is authoritative. The Attorney General is the Commonwealth's chief law enforcement officer, and she sent the guidance letter to all law enforcement agencies with an RHCF in their jurisdiction.[298] This court has no reason to believe that the guidance will be anything but strictly heeded. Additionally, if past experience in the *McGuire* line of cases serves as a guide, law enforcement will interpret the statute in a manner consistent with the Attorney General's position.

Finally, despite Plaintiffs' argument to the contrary,[299] nothing in the exemption itself or the Attorney General's interpretation appears to encourage arbitrary and discriminatory enforcement.[300] The exemption and the Attorney General's interpretation of the exemption are clear for the reasons above. Additionally, to the extent the "solely" determination requires a judgment call, " '[a]s always, enforcement requires the exercise of some degree of police judgment.' "[301] As in

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[298] *See* Narayanan Aff. at 1 (Trial Ex. 26).

[299] *See* Compl. at 20; PFF at 42.

[300] Indeed, the fixed buffer zone itself provides clearer guidance to law enforcement than its predecessor. Instead of a floating buffer zone with a subjective "approach" requirement, the fixed buffer zone—which is clearly marked on the pavement—provides police with a bright-line basis to assess violations. A non-exempt person is either inside the zone or outside the zone.

[301] *Hill*, 530 U.S. 703, 733 (2000) (*quoting Grayned*, 408 U.S. at 114).

Hill, at least facially, "the degree of judgment involved here is acceptable."[302]

For these reasons, the Act is not unconstitutionally vague, and Count VI of Plaintiffs' Complaint fails.

B. Count VII. Liberty Interest

Count VII of the Complaint alleges violation of Plaintiffs' liberty interests protected by the Due Process Clause. Plaintiffs base this claim on the "freedom to loiter for innocent purposes," and "their rights to intrastate travel in violation of the Fourteenth Amendment."[303] Although Plaintiffs did not press this cause of action at the Bench Trial, this court will address it briefly.

Plaintiffs support this cause of action[304] by reference to *City of Chicago v. Morales*.[305] There, the Supreme Court addressed Chicago's "Gang Congregation Ordinance," which prohibited "criminal street gang members" from "loitering" in public places.[306] In addressing the overbreadth doctrine, Justice Stevens noted, writing for the plurality, "[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[307]

The Court, however, explicitly declined "to decide whether the impact of the Chicago ordinance on consti-

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[302] *Id.*

[303] Compl. at 21.

[304] *See* Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 33.

[305] 527 U.S. 41 (1999).

[306] *Id.* at 45-46.

[307] *Id.* at 53.

tutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine."[308] Instead, the Court found the law unconstitutionally vague.[309] The "freedom to loiter" reference, therefore, was dicta and not precedential.[310]

Even acknowledging, however, a "right to loiter," this court agrees with the Seventh Circuit that "it is not at all clear, and indeed, quite improbable, that Justice Stevens undertook in this statement any type of fundamental rights analysis."[311] Accordingly, even assuming Plaintiffs are "seeking a right to enter" the areas immediately adjacent to RHCF entrances and driveways "simply to wander and loiter innocently," this court "cannot characterize that right as 'fundamental.' "[312]

As a result, this court applies rational basis review to this count.[313] This court has already held, however, that the Act passes intermediate scrutiny. This ends the analysis, and Plaintiffs' liberty interests count also fails.

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[308] *Id.* at 55.

[309] *Id.* at 55-64.

[310] This court also does not believe that the statement rises to the level of a "carefully considered statement" recognized by the First Circuit as controlling precedent. *See United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993).

[311] *Doe v. City of Lafayette*, 377 F.3d 757, 772 (7th Cir. 2004).

[312] *Id.* at 772-773.

[313] *See id.* at 773 ("Because we have concluded that the City's ban does not encroach on a fundamental liberty interest, we are bound to apply the rational basis standard of review to the City's ban.").

Conclusion

For the foregoing reasons, the Act survives under all three facial challenge standards. Because the Act passes constitutional muster under the First Amendment, the Equal Protection Clause and the Due Process Clause, Plaintiffs have fallen far short of establishing that "no set of circumstances exists under which the Act would be valid."[314] Furthermore, the Act has a "plainly legitimate sweep."[315] Lastly, Plaintiffs have failed to establish that the Act is impermissibly overbroad.[316]

Because Defendant prevails on all counts of Plaintiffs' facial challenge, Plaintiffs' request for preliminary and permanent injunctive relief is DENIED.[317]

This matter now proceeds to Plaintiffs' as-applied challenge. A Status Conference shall be held to establish a discovery schedule and trial date.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

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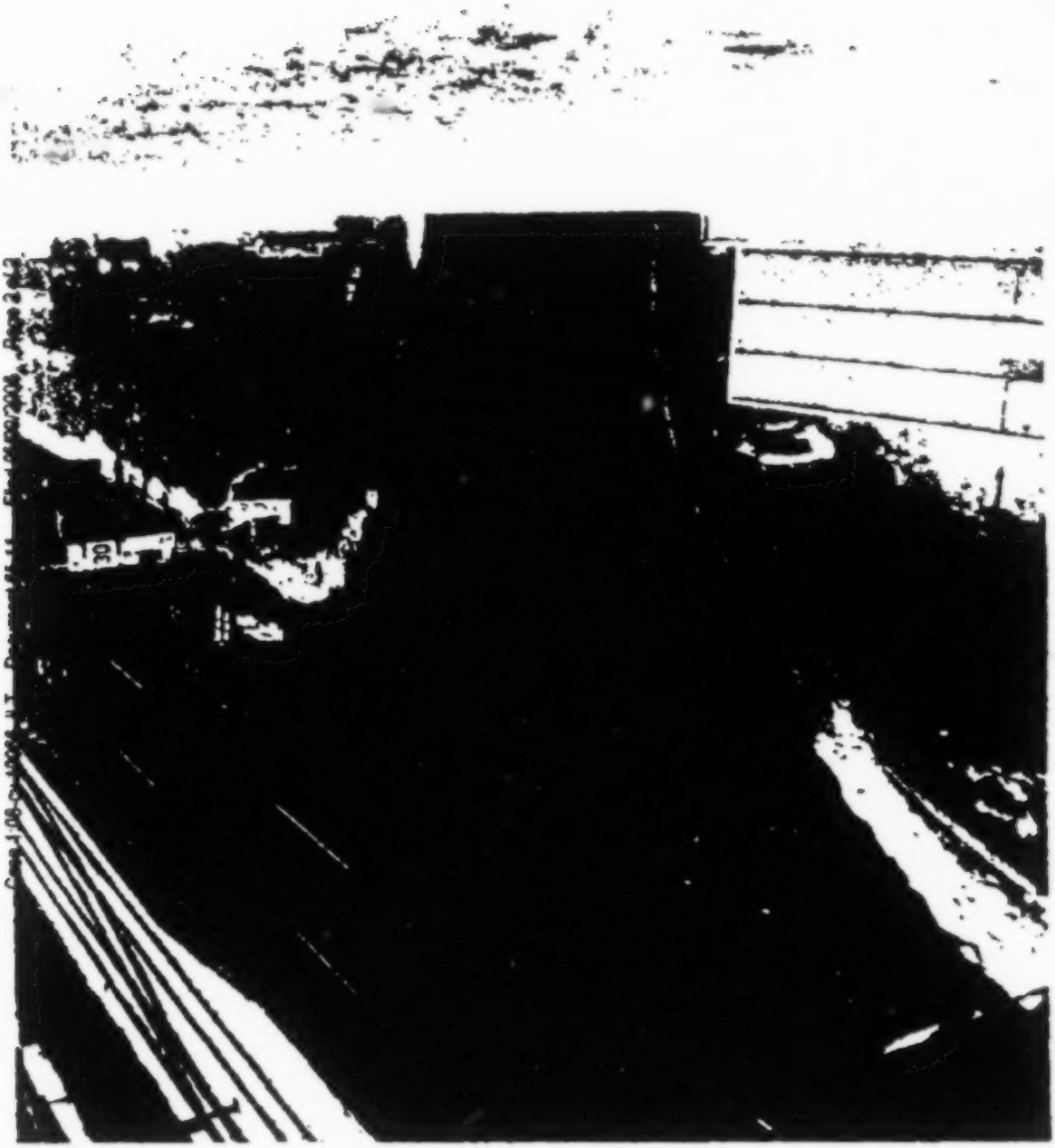
[314] 481 U.S. 739, 745 (1987).

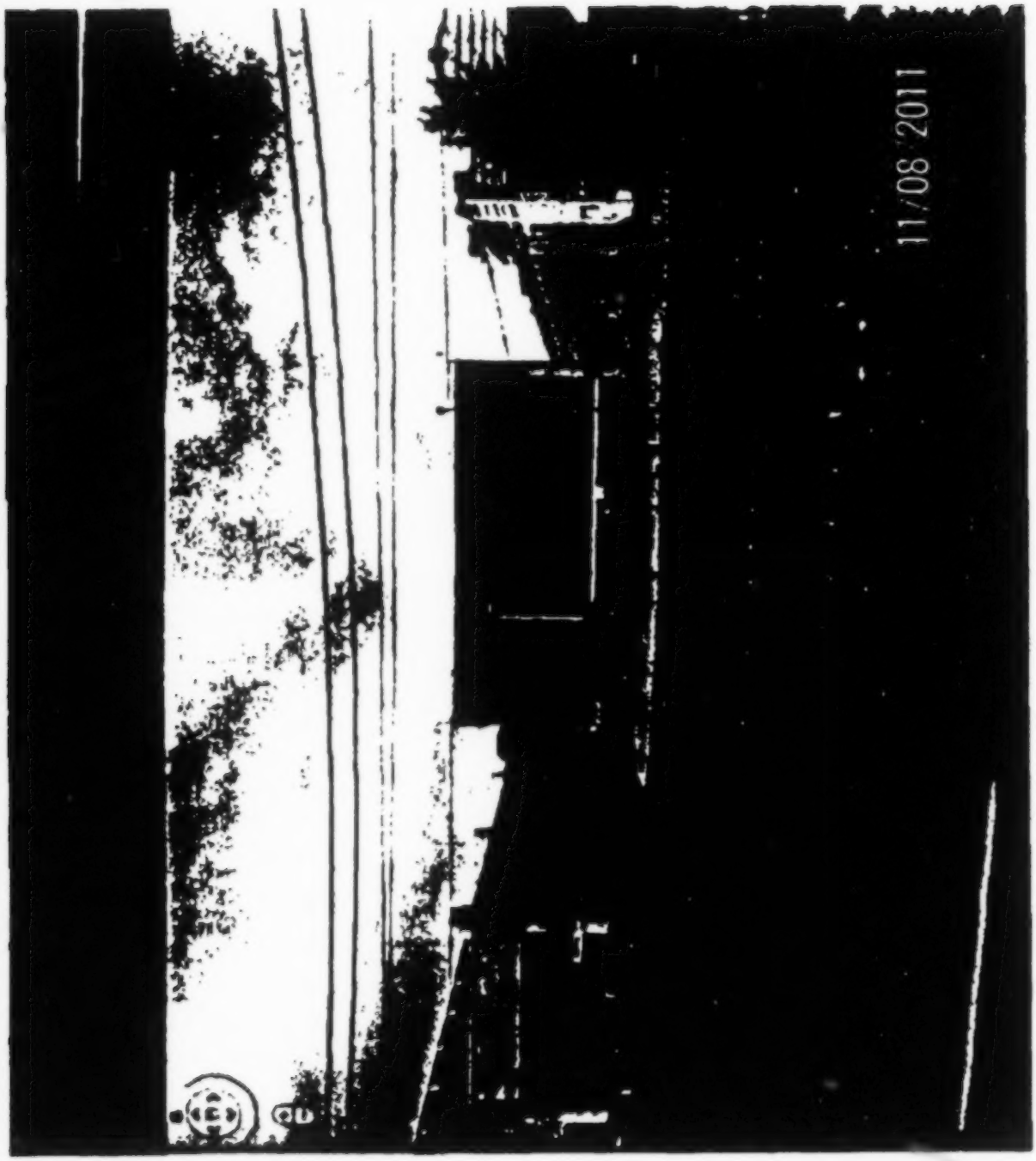
[315] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 739-40, and n.7 (1997) (Stevens, J., concurring in judgments)).

[316] *See id.* at 1191 n.6 (*citing New York v. Ferber*, 458 U.S. 747, 769-71 (1982) and *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[317] *See, e.g., McDonald's Corp. v. Rappaport*, 532 F. Supp. 2d 264, 275 n.67 (D. Mass. 2008) (Tauro, J.) ("Because [Plaintiff] has not prevailed on the merits, and all four elements of the injunction standard must be met for an injunction to issue, this court need not address the remaining elements of the standard.").

APPENDIX F

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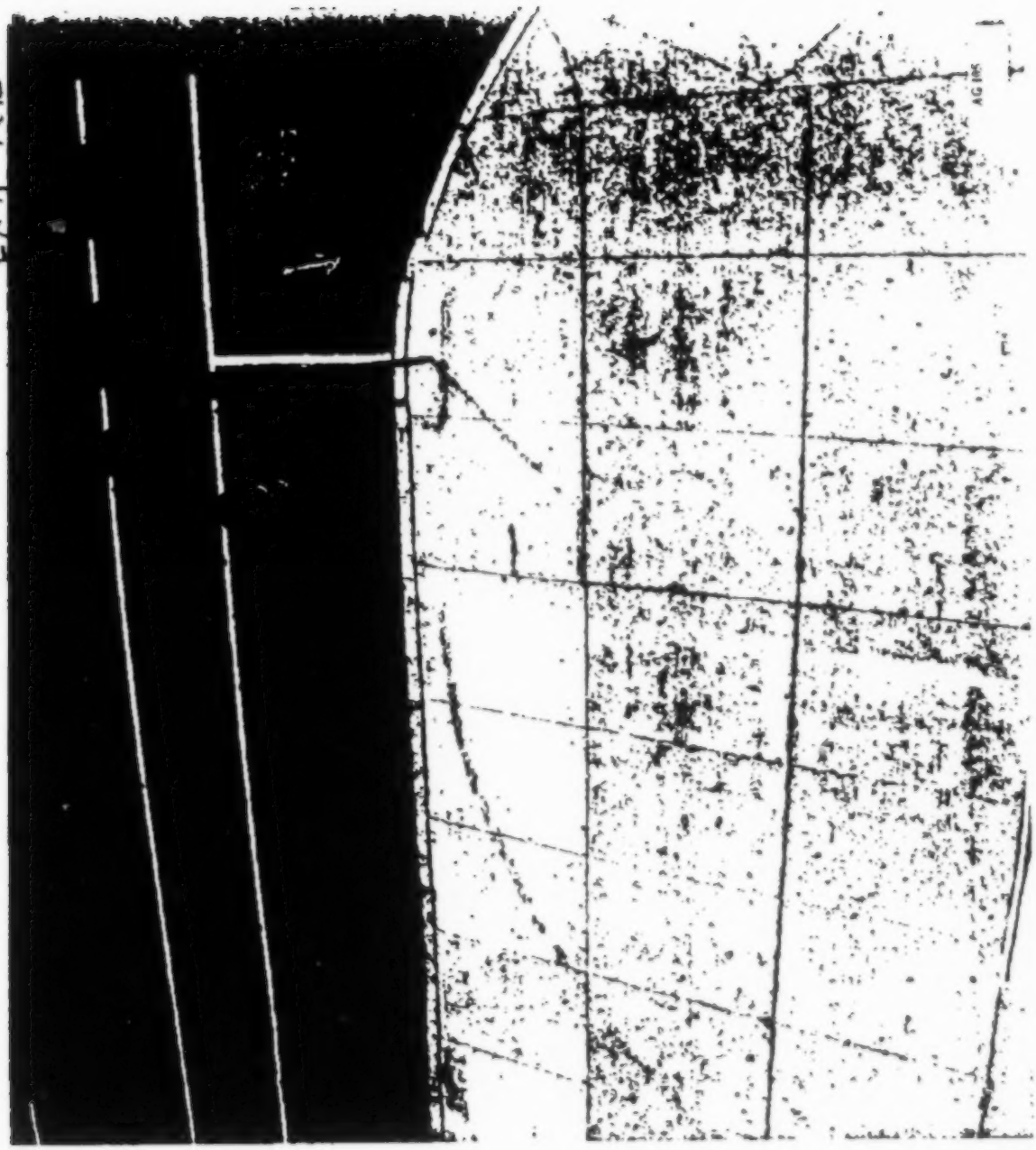
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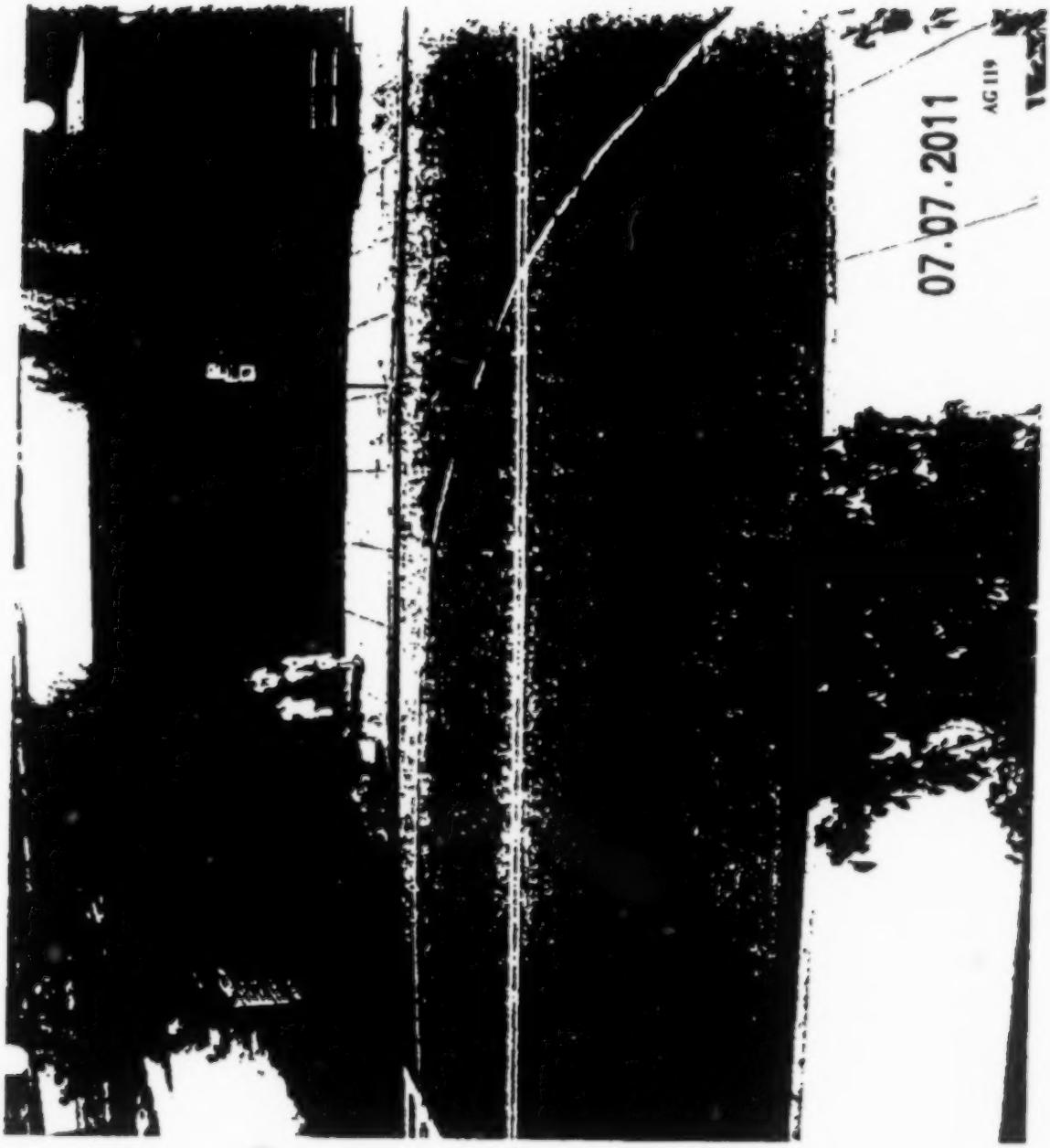
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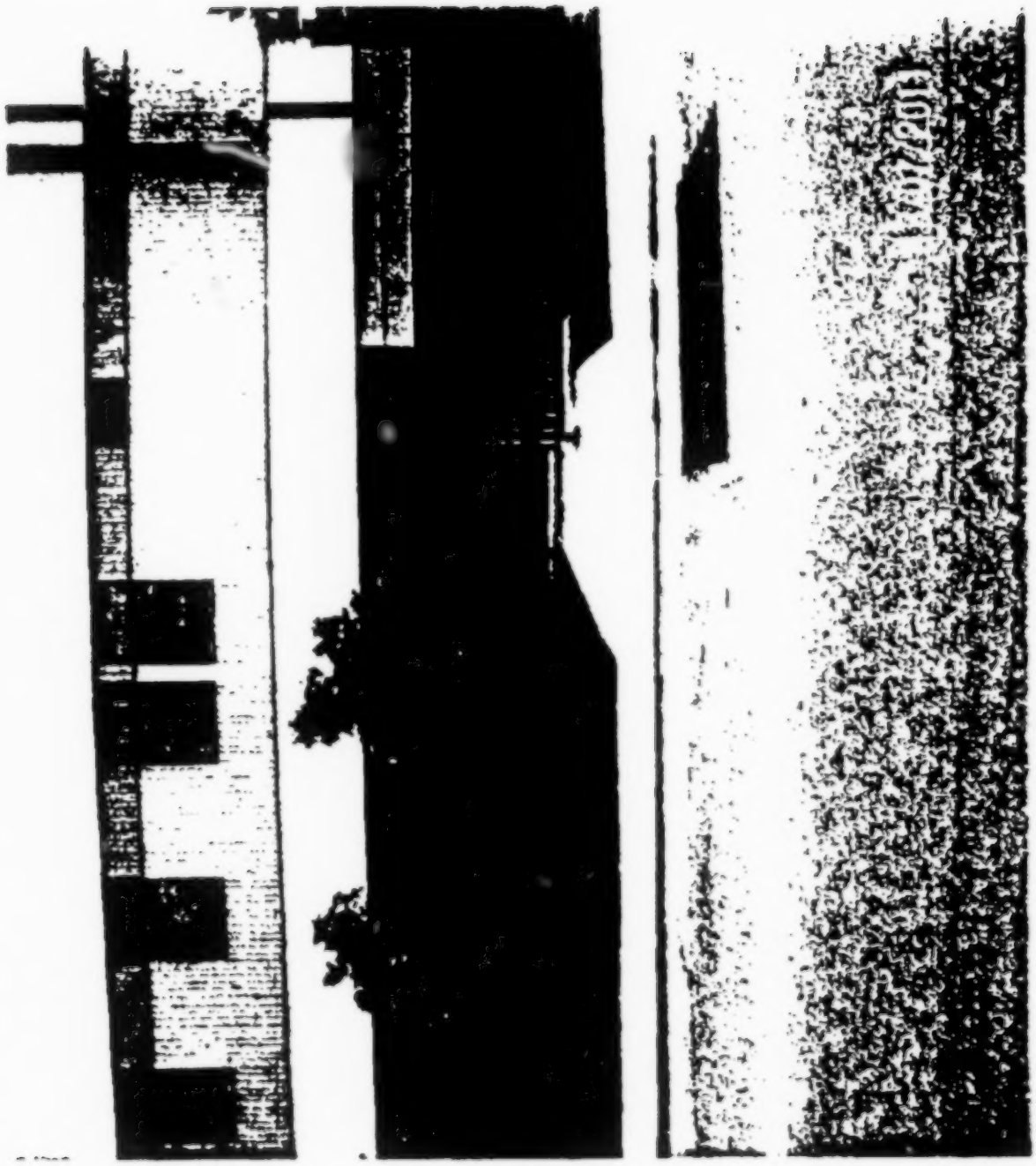

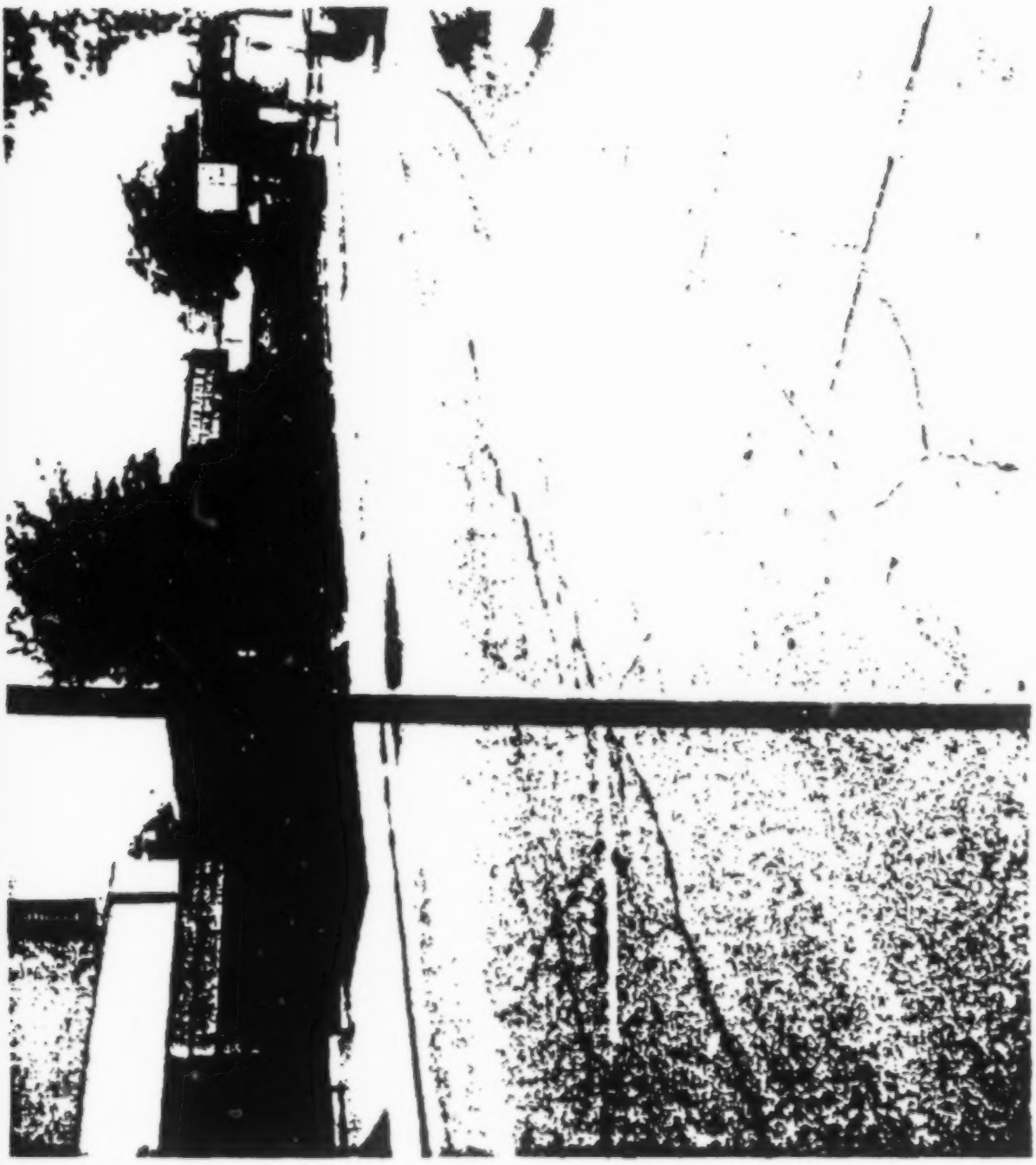

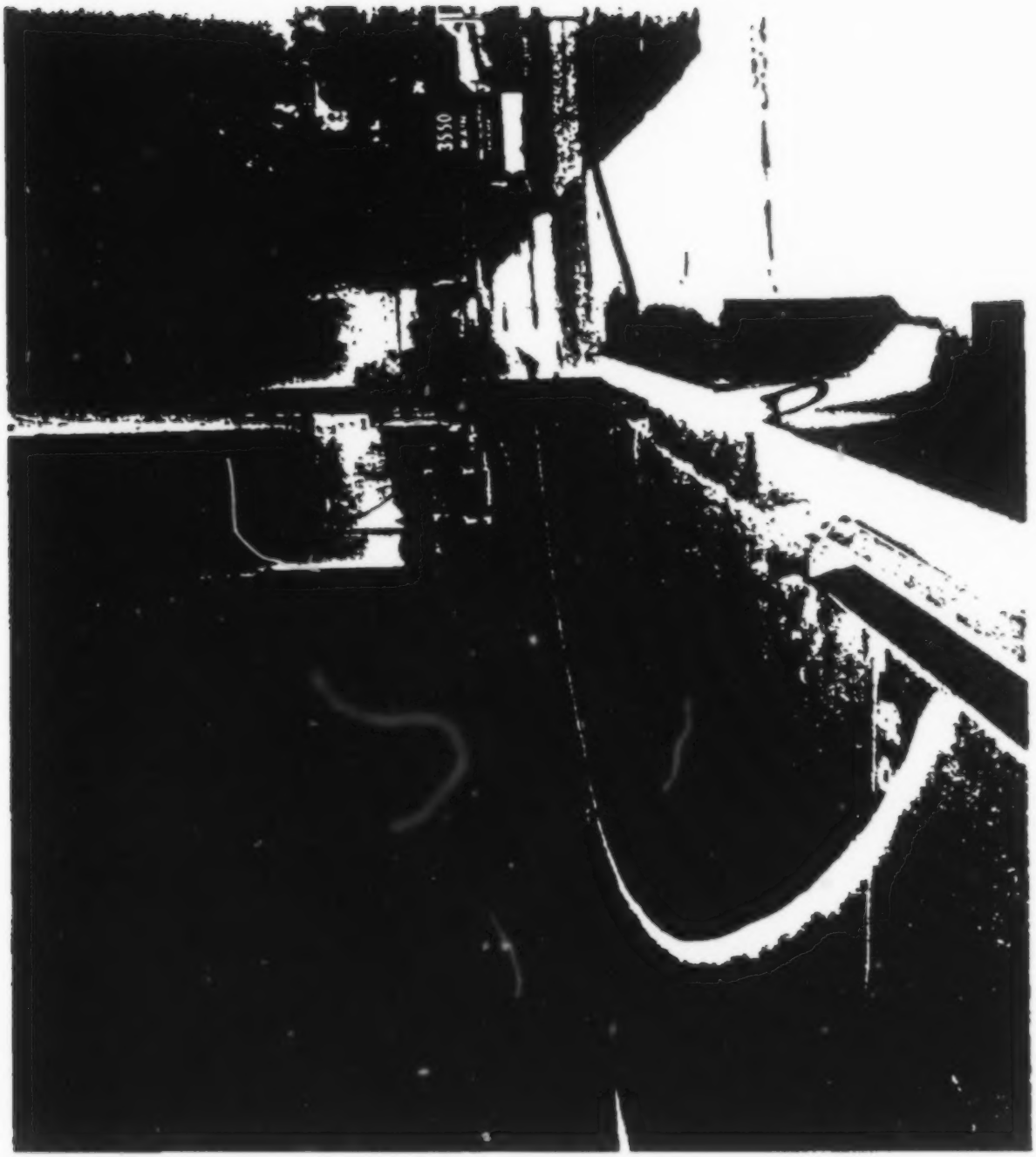
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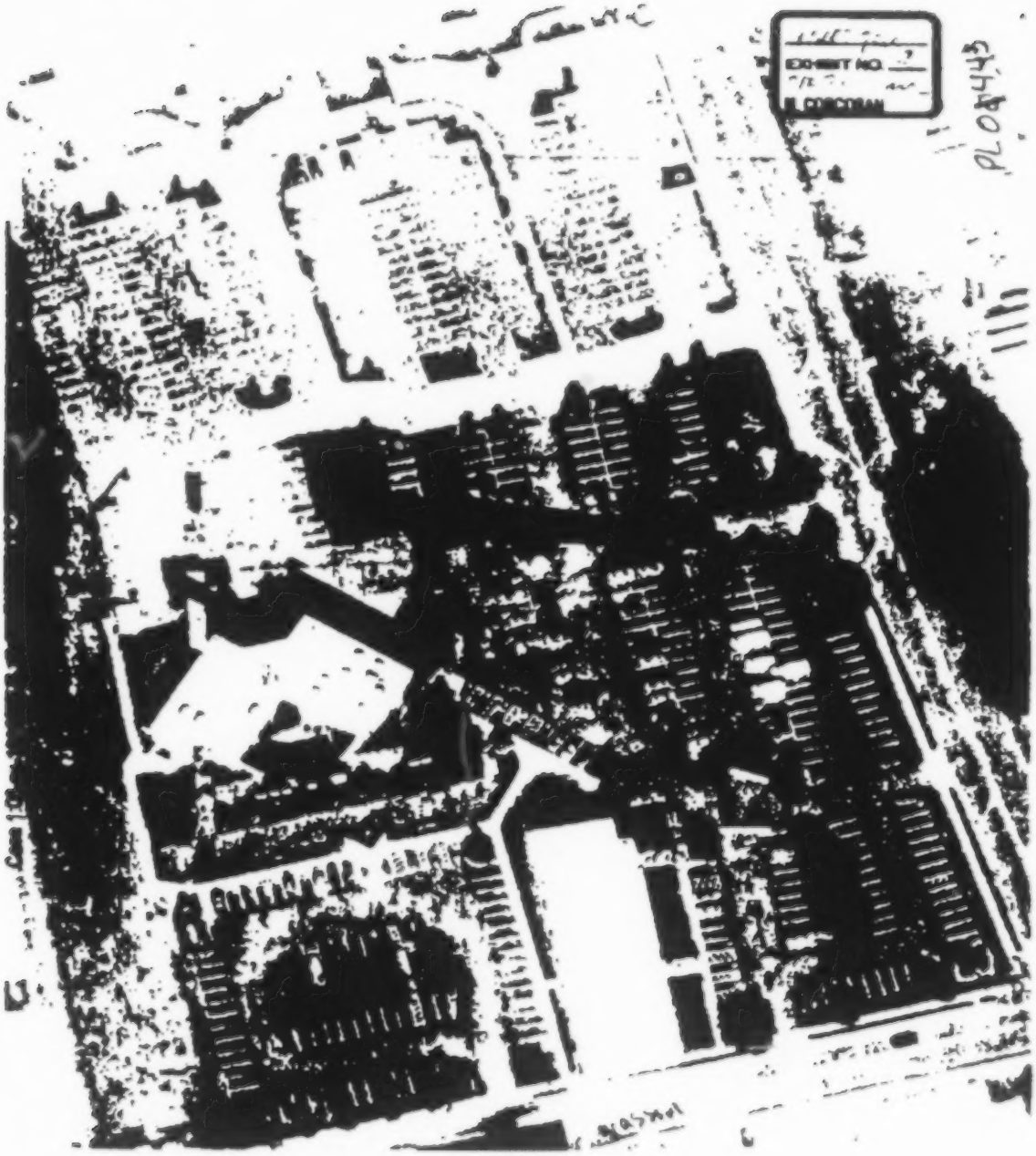
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PLAINTIFF

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ... .

U.S. Const. amend. XIV

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mass. Gen. Laws c. 266, § 120E 1/2. Reproductive health care facilities

(a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.

(b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle

created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff, deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or

exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 nor more than $5,000 or not more than two and one-half years in a jail or house of correction, or by both such fine and imprisonment. A person who knowingly violates this provision may be arrested without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

OPPOSITION BRIEF

MAY 24 2013

No. 12-1168

In the Supreme Court of the United States

ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY, as Attorney General for the Commonwealth of Massachusetts, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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May 24, 2013

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QUESTION PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature limited access during business hours to public ways and sidewalks within a fixed "buffer zone" immediately next to entrances and driveways of reproductive health care facilities. In 2009, the United States Court of Appeals for the First Circuit held that the statute is constitutional on its face and this Court denied review. Upon remand, the district court rejected Petitioners' claim that the statute is unconstitutional as applied at three discrete locations and the court of appeals affirmed.

The question presented is:

Whether the court of appeals correctly applied this Court's cases holding that statutes regulating the time, place, or manner of communicative activities in public fora are constitutional so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

LIST OF PARTIES

Petitioners: ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN.

Respondents: MARTHA COAKLEY, as Attorney General for the Commonwealth of Massachusetts; DANIEL F. CONLEY, as District Attorney for Suffolk County; MARK G. MASTROIANNI, as District Attorney for Hampden County, and JOSEPH D. EARLY, JR., as District Attorney for Worcester County.

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BRIEF FOR RESPONDENTS IN OPPOSITION

In this case the First Circuit applied the Court's well-settled law governing time, place and manner restrictions on speech to uphold the Act on its face and, after remand and a trial in district court, as applied at three discrete locations. The main feature of the Act – a "buffer zone" at clinic entrances and driveways – is nearly identical to the restriction upheld in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). As such, the case does not implicate a significant question for review.

Petitioners contend that review is warranted for two main reasons, each of which lacks merit. Petitioners assert that the Act discriminates in permitting clinic employees to enter the buffer zone to assist and protect patients. The First Circuit correctly rejected this claim because the employee exemption furthers the content-neutral, public-safety goals of the Act; the exemption does not permit pro-choice (or any other) advocacy by employees in the buffer zone. Petitioners are also wrong to urge that *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) is in conflict with the decision below. Both decisions upheld, on their face, laws imposing zone restrictions outside the entrances to reproductive health care facilities. The courts differed in assessing the laws as applied, but only because of a dispositive difference in the facts. In Oakland, the police admitted to a policy of discriminatory enforcement, freely permitting clinic employees to counsel patients inside the restricted areas. In the decision below, the court of appeals found that Petitioners failed even to allege a lack of evenhanded police enforcement.

Finally, this case is not a vehicle for the Court to reconsider its holding in *Hill v. Colorado*, which Petitioners and their *amici* also urge. *Hill* upheld a Colorado law imposing a floating no-approach zone around persons within 100 feet of medical facilities; the Massachusetts Act creates a fixed buffer zone immediately next to clinic entrances and driveways, smaller than a similar restriction upheld in *Madsen*. Any criticism that *Hill* might have generated among commentators is, for the most part, inapplicable to the buffer zone law in Massachusetts.

STATEMENT OF THE CASE

This case concerns a 2007 amendment to a Massachusetts statute that creates a protective "buffer zone" around the entrances and driveways to reproductive health care facilities ("RHCFs"). In 2009, the United States Court of Appeals for the First Circuit held that "the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face." Pet. App. 118a. Following a bench trial in 2011, the district court rejected Petitioners' claims that the Act is unconstitutional as applied at three specific locations and the court of appeals affirmed. Pet. App. 1a-28a.

(1) Statutory Background.

(a) The Original Act.

The Massachusetts Legislature enacted the original Reproductive Health Care Facilities Act in 2000. Pet. App. 129a. Based on a history of violence outside clinics and ongoing harassment and intimidation of women attempting to obtain medical services at such facilities, the Legislature concluded that existing laws did not adequately protect public safety immediately next to RHCFs. *Id.* 95a-96a.

The 2000 Act was modeled on the law upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), and included the following provisions. *First*, similar to the statute in *Hill*, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside a zone defined by an 18-foot radius from any RHCF entrance or driveway, or within a six-feet wide rectangle extending from clinic entrances to the street, if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 130a (quoting Mass. St. 2000, c. 217, § 2(b)).

Second, the Legislature exempted the following four categories of persons from the Act's restrictions:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;

> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 130a-131a (quoting Mass. St. 2000, c. 217, § 2(b)).

Third, the Act stated that its provisions "shall only take effect during a facility's business hours and [only] if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted." *Id.*

The original Act was challenged in federal court on constitutional grounds. Pet. App. 133a-134a. The First Circuit reversed a preliminary injunction against enforcement, holding that the Act, "on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"). In particular, the court found that the clinic-employee exemption advanced the content-neutral, public-safety purposes of the Act by permitting employees to "assist in protecting patients and ensuring their safe passage" as they approached clinics. *Id.* at 45-46.

On remand, the district court held that the 2000 Act was constitutional on its face and as applied at clinics

in Boston and Brookline. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (facial challenge); *McGuire v. Reilly*, 271 F. Supp. 2d 335, 343 (D. Mass. 2003) (as applied). The First Circuit affirmed both rulings. *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) ("*McGuire* II). This Court denied certiorari. 544 U.S. 974 (2005).

(b) Public Safety Was Still Threatened.

The Massachusetts Legislature revised the Act in November 2007 because "there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 165a; *see also id.* 97a, 135a-149a. The purpose of the 2007 revision was "to increase forthwith public safety at reproductive health care facilities." *Id.* 153a (quoting Mass. St. 2007, c. 155).

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature had learned that—despite the original Act—clinic access was still being physically blocked, patients were still being harassed as they tried to enter clinics, and the "approach" element of the floating buffer zone made it very hard for law enforcement officials to enforce the original Act. Pet. App. 137a-149a. It "heard testimony from RHCF staff, volunteers and law enforcement personnel regarding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways." *Id.* 139a.

Witnesses described how protesters regularly barred access to clinics by physically blocking doors and driveways, and screamed from close range and

from immediately next to doorways or driveway entrances at patients trying to enter clinics. Pet. App. 139a-144a. They testified that these confrontations "terrified" patients; that some patients "reported feeling too intimidated by the pacing protesters to enter the property, and turning back;" and that women trying to drive to a clinic would regularly turn away because protesters were blocking the driveway. Pet. App. 140a, 143a. Attorney General Coakley summarized the ongoing history of interference with clinic access, and explained why it constituted an important public safety problem. Pet. App. 137a-139a.

In addition, law enforcement representatives told the Legislature that: (i) it was very difficult to enforce the original Act because it was hard to determine whether a protester had "approached" someone else without their consent within the restricted area; and (ii) creating a fixed and clearly defined buffer zone around RHCF entrances was needed to ensure public safety. Pet. App. 144a-149a. Capt. Evans compared the 18-foot restricted area near clinic entrances to a "goalie's crease," where "everybody is in everybody's face," which "makes it very difficult" for the police to determine whether an unlawful "approach" had been made within the buffer zone. *Id.* 147a-148a. He explained that this made it very hard to keep patients safe immediately next to clinic entrances. *Id.* 148a.

(c) The 2007 Amendment.

In November 2007 the Legislature deleted the floating buffer zone provision of the original Act and replaced it with a new fixed buffer zone provision that makes it unlawful to "knowingly enter or remain on a

public way or sidewalk adjacent to [an RHCF] within a radius of 35 feet of any portion of an entrance, exit or driveway of [an RHCF]." Pet. App. 154a (quoting Mass. G.L. c. 266, § 120E1/2(b)).

In all other substantive respects the buffer zone provision of the Act remains identical to the version previously upheld in *McGuire I* and *McGuire II*. The Act continues to apply only during a clinic's business hours, and only if the buffer zone limits are "clearly marked and posted." Pet. App. 155a (quoting Mass. G.L. c. 266, § 120E1/2(c)). In addition, the same four categories of persons are exempt from the buffer zone restrictions. Pet. App. 154a.

(2) Factual and Procedural Background.

Petitioners filed this action in January 2008, claiming that the 2007 Act is unconstitutional on its face and as applied. Pet. App. 4a, 98a. Petitioners have not been arrested or threatened with arrest for violating the revised Act, and there is no indication in the record that anyone else has either. At Petitioners' request, the district court bifurcated trial of the facial challenge from trial of the as-applied challenge. *Id.* 98a-99a, 123a.

(a) Facial Challenge.

Petitioners' facial challenge was decided after a bench trial on an agreed-upon factual record. Pet. App. 30a-33a, 123a. In August 2008 the district court held that the 2007 Act is constitutional on its face, and denied Petitioners' request for injunctive relief. Pet. App. 121a-210a. Petitioners appealed this

interlocutory order under 28 U.S.C. § 1292(a)(1). *Id.* 99a.

The court of appeals held that the revised Act is constitutional on its face. Pet. App. 93a-120a. It found that the law is content neutral because it "was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech." *Id.* 102a. Petitioners had conceded before the district court that, in Petitioners' words, "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "[clear] out the bottleneck . . . immediately adjacent to" clinic doors and driveways, and that each of these goals is "a legitimate interest of the government." Pet. App. 178a. The court of appeals explained that the exemption that permitted clinic employees to enter the buffer zone to protect and assist patients is also content neutral because it "remains [in the amended Act] reasonably related to the legislature's legitimate public safety objectives." Pet. 106a.

The court "proceeded, therefore, with intermediate scrutiny," *id.* 107a, following the well-established standard that applies to "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur," *id.* 101a. Applying the next prong of this test, the court of appeals found that the law is narrowly tailored to serve a substantial governmental interest in enhancing public safety around RHCF entrances, without burdening substantially more speech than necessary. *Id.* 107a-110a. With respect to the third prong, the court held that the 2007 Act leaves open ample

alternative channels of communication, because it "places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone," and, on its face, the size of the zone was not unreasonable. *Id.* 110a-111a. Following the court of appeals' decision upholding the 2007 Act on its face, this Court denied review. 130 S.Ct. 1881 (2010).

(b) As-applied Challenge.

When the case returned to the district court, Petitioners again sought to challenge the Act on its face, which claim the district court found barred by the law of the case doctrine. Pet. App. 70a. The district court also dismissed Petitioners' as applied claim that the clinic employee exemption resulted in unconstitutional viewpoint discrimination, finding that Petitioners failed to allege any facts that would support the claim (for example, that "police knowingly let clinic employees engage in pro-choice advocacy within a buffer zone"). Pet. App. 86a. Petitioners also challenged the Act as applied at clinic locations in Boston, Worcester and Springfield. With respect to these claims, the court held that the only issue remaining to be decided was "whether the statute as applied at the clinics specified in the complaint leaves open adequate alternative channels of communication." Pet. App. 88a.[1]

---

[1] The district court so limited the issues because the facts asserted by Petitioners with respect to content neutrality and narrow tailoring in support of their as-applied challenge "repeat in relevant part the same fact patterns envisioned in [the] adjudication of their failed facial challenge." Pet App. 21a.

The district court held a bench trial on Petitioners' as-applied claims. Pet. App. 32a. Again, the parties stipulated as to the factual record, which was gleaned from depositions of the parties and other discovery. Pet. App. 37a. After setting out its findings in detail, the district court concluded that Petitioners have ample opportunities to communicate with clinic patients outside the RCHF locations in Boston, Worcester and Springfield. Pet. App. 37a-66a.

At Planned Parenthood's Greater Boston Health Center, located on Commonwealth Avenue at the corner of Alcorn Street, all patients enter the clinic from the front sidewalk. "[Petitioners] and others who wish to communicate with clinic patrons may do so while standing: (1) on the wide sidewalk to the east of the Commonwealth Avenue entrance; (2) in the fairly narrow strip between the top of the buffer zone and Commonwealth Avenue; and (3) while standing on the sidewalk across Alcorn Street." Pet. App. 40a. When large numbers of protesters are expected, the Boston Police Department places barriers several feet into Commonwealth Avenue to provide additional space for those wishing to engage in communications aimed at clinic patients. *Id.* Petitioners testified that they regularly speak with clinic patients and hand out literature outside the Boston clinic. Eleanor McCullen, who engages in "sidewalk counseling" outside the clinic twice per week, estimates that after the revised buffer zone law went into effect (in the period November 2007 to May 2011), she was able to persuade eighty women not to have abortions. Pet. App. 7a, 42a.

Planned Parenthood's Central Massachusetts Health Center is located at 470 Pleasant Street in

Worcester, near the intersection with Dewey Street. Protesters there may communicate with clinic patients from a number of locations around the clinic, including: (1) along Pleasant Street on either side of the buffer zone; (2) directly across Pleasant Street from the clinic entrance; and (3) across narrow Dewey Street where cars turn into the clinic parking lot. Pet. App. 51a-57a. People standing in these locations can be seen and heard by clinic patients driving into the parking lot and approaching the clinic entrance. Pet. App. 56a-57a. At the Worcester clinic, petitioners Nancy Clark and Mark Bashour speak to Worcester clinic patients and distribute pamphlets. Pet. App. 53a. On some days Clark holds a sign that says "Face It, Abortion Kills", which patients and passersby notice and respond to "in both positive and negative ways." *Id.* Ms. Clark estimates that she has convinced four or five women to go to a nearby pro-life center, instead of into the clinic. *Id.*

Planned Parenthood's Western Massachusetts Health Center is located in Springfield, within a three-building medical complex at the corner of Main Street and Wason Avenue. Pet. App. 59a-60a, 218a. The complex is set back from both Main Street and Wason Avenue. *Id.* 60a. The entrances to two of the seven driveways leading into the private parking area for the complex have marked and posted buffer zones. *Id.* 8a-9a, 60a, 217a-218a. Petitioner Cyril Shea protests on the sidewalk outside the Springfield clinic wearing a large sign that reads "They're Killing Babies Here." *Id.* 61a-62a. People often react both positively and negatively to his sign. *Id.* 62a. Dr. Shea observes others counseling women outside the clinic and, on occasion, has been called over to offer his medical

perspective. *Id.* Based on this and other detailed evidence of Petitioners' activities the district court held that Petitioners have ample alternative avenues of communication at the three sites. Pet. App. 66a.

The court of appeals affirmed the district court's decision after remand. Pet. App. 1a-28a. The court first rejected Petitioners' effort to again challenge the Act on its face, finding its earlier decision the law of the case. Pet. App. 9a-14a. The court upheld the district court's ruling that Petitioners had failed to allege facts to support a claim that, by virtue of the clinic employee exemption, the Act, as applied, discriminated against their anti-abortion viewpoint. The court explained that (i) on its face, the exemption "does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others," and (ii) Petitioners had not alleged that improper behavior by clinic escorts – such as "using their exempt status . . . to advocate a particular point of view"– "has been sanctioned by the state." Pet. App. 15a, 17a.[2]

The court also held, on the extensive trial record, that Petitioners have adequate alternative avenues of communication at each of the three facilities. "The record makes plain that communicative activities flourish at all three places." Pet. App. 23a. All of the Petitioners actively engage in protest or sidewalk counseling at one of the three sites. *Id.* 6a. In addition, as the court summarized, "the plaintiffs and

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[2] Indeed, Petitioners did not report having even complained to police officers or state authorities about the behavior of clinic escorts in the buffer zone. Pet. App. 17a.

their placards are visible to their intended audience. Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. [They also] congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments." Pet. App. 23a. Each petitioner "has an opportunity to reach her intended audience." Pet. App. 23a.

REASONS FOR DENYING THE PETITION

The decision below is consistent with the Court's well-established standard for evaluating the constitutionality of restrictions on the time or place for engaging in expressive activity in public fora, and does not raise any important but unresolved federal question. Nor does it conflict with decisions of other courts of appeals. There is, moreover, no reason for the Court to review the fact-bound question of whether Petitioners have adequate alternative avenues of communication at three dissimilar clinic locations.

The Court declined to review this case in 2010 after the court of appeals upheld the Act on its face. 130 S.Ct. 1881 (2010). The current petition is again focused, almost entirely, on the facial aspect of Petitioners' challenge. *See* Pet. 19-31. Because nothing has changed since 2010 to make the case any more deserving of review, the Court should again deny the petition.

I. The Decision Below Is Consistent with the Court's Prior Buffer Zone Cases.

The First Circuit's holding that the Act is constitutional on its face is consistent with *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Hill v. Colorado*, 530 U.S. 703 (2000). *Madsen* upheld an injunction barring protesters from public rights-of-way within thirty-six feet of the property line of a particular RHCF *See* 512 U.S. at 768-70. *Schenck* upheld an injunction barring protesters from demonstrating within fifteen feet of entrances and driveways of any RHCF in the Western District of New York. 519 U.S. at 366 n.3, 374-76, 380-82.[3] *Hill* upheld a Colorado statute that made it unlawful, within 100 feet of health care facility entrances, to approach closer than eight feet of someone without their consent in order to pass a

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[3] Though *Schenck* involved two different 15-foot buffer zones, Petitioners fail to distinguish them. *Cf.* Pet. 29. The Court upheld "the fixed buffer zones around the doorways, driveways, and driveway entrances," because they "are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Schenck*, 519 U.S. at 380-82. It struck down the "floating" portion of the injunction—which required all protesters to stay at least 15 feet away from any person or vehicle seeking access to or leaving a clinic, no matter where the person or vehicle was located—because "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" and thus created a "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 377-78.

leaflet, display a sign, or engage in oral protest, education, or counseling. 530 U.S. at 714-35.

The fixed buffer zone established by the 2007 Act is very similar to the buffer zones that were established by injunction and upheld in *Madsen* and *Schenck*. Since the buffer zone established by the revised Act (with a 35-foot radius around each clinic entrance or driveway) is substantially smaller than the one upheld in *Madsen* (with a 36-foot radius around the clinic's property line), and since the injunctions in *Madsen* and *Schenck* passed muster under a more stringent standard of review than applies here,[4] it was entirely consistent for the court of appeals to hold that the revised Act is constitutional on its face.[5]

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[4] If this case involved an injunction that restricts speech, rather than a statute of general application, the lower courts would have been required to apply "a somewhat more stringent application of general First Amendment principles" and determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765 (reviewing buffer zone injunction). But since the 2007 Act is a law of general application reflecting "a general policy choice" by the Massachusetts Legislature, the court of appeals correctly assessed the Act "under the constitutional standard set forth in *Ward* [*v. Rock Against Racism*, 491 U.S. 781, 791 (1989)], rather than a more strict standard." *Hill*, 530 U.S. at 731 (reviewing buffer zone statute). *See* Pet. App. 108a.

[5] The same is true of the Third Circuit's decision to uphold a similar buffer zone against constitutional challenge. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3d Cir. 2009) (upholding ordinance creating 15-foot buffer zone around entrances to hospitals and health care facilities).

Despite the obvious relevance of this precedent, Petitioners do not discuss *Madsen* and only cite *Schenck* with respect to the portion of the decision that struck down the floating buffer zone. Pet. 29. By ignoring these decisions affirming fixed buffer zones so similar to the 2007 Act, Petitioners tacitly concede there is no inconsistency between them and the decision of the court of appeals that would support certiorari review.

Consistent with *Hill*, the First Circuit ruled that the revised Act falls into the category of "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur." Pet. App. 5a, 101a. Thus, the court of appeals' application of the "intermediate scrutiny" standard that governs whether such regulations violate the Free Speech Clause is consistent with long standing precedent of this Court. *Hill*, 530 U.S. at 731. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The First Circuit correctly held that "[r]egulations of this type will be upheld as long as 'they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" Pet. App. 101a (quoting *Ward*, 491 U.S. at 791).

The Act "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." *Hill*, 530 U.S. at 731. Petitioners remain free to engage in any kind of speech (including close personal conversations) and to offer

any type of information they wish, so long as they do not do so within a clearly marked and posted buffer zone during clinic business hours. Pet. App. 37a-38a. As the district court found:

> [A]s long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.

Pet. App. 35a-36a; *accord id.* 110a-111a (court of appeals). Plainly, the Act does not "destroy [Petitioners'] ability to convey their particular message." *Cf.* Pet. 32.

Petitioners' disagreement with the decision below reduces to a contention that the court of appeals misapplied well-settled law addressing fixed buffer zones and time-place-manner restrictions. Because the court of appeals applied the correct and guiding standards of this Court, certiorari review is not warranted to consider Petitioners' claims of error in this case.

II. The Court of Appeals Correctly Applied This Court's Precedent in Holding that the Act is Content Neutral.

"Government regulation of expressive activity is content neutral so long as it is *'justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *accord Hill*, 530 U.S. at 720; *Madsen*, 512 U.S. at 763. In this case, "[t]he Act is justified by 'conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services,' without *any* reference to content." Pet. App. 165a (emphasis in original) (quoting *McGuire I*, 260 F.3d at 44); *see also* Pet. App. 102a-105a.

Application to Clinics. Petitioners insist that, because the Act was narrowly tailored to apply only outside RHCFs, it is an "abortion-specific" restriction. Pet. 4, 26, 31. The mere fact that the statute in *Hill* applied to all medical facilities, while the Massachusetts statute applies only to RHCFs where abortions are offered or performed, does not mean that the court of appeals' decision "conflicts with *Hill's* content-neutrality analysis." Pet. 28. A legislature may ensure that a content-neutral time, place, or manner restriction is narrowly tailored by confining its application to "the place where the restriction is most needed." *Hill*, 530 U.S. at 730. That is what the Massachusetts Legislature did here.

The revised Act safeguards RHCF entrances and driveways because that is where protesters regularly

undermined public safety and threatened and intimidated patients and staff. Pet. App. 109a, 164a-165a. "[T]he [Legislature's] investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 165a. The legislative record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *Id.* 168a. But nothing in the record supports Petitioners' suggestion that the "same problem" exists at other health care facilities that are not covered by the Act. *Cf.* Pet. 28.

Petitioners' argument that the revised Act is too narrowly tailored echoes one rejected in *Hill*. There, the Court rejected an assertion that the Colorado statute was not content neutral because it protected only the entrances of medical facilities and did not apply more broadly, and held that a time, place, or manner regulation is not "unconstitutionally content based" merely because it applies to specific locations and not others. *Hill*, 530 U.S. at 724. For example, "[a] statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports . . . ." *Id.* Similarly, the Massachusetts statute is not content-based merely because it applies to RHCFs and not other medical facilities. Pet. App. 28a; *McGuire I*, 260 F.3d at 44.[6]

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[6] The Ninth Circuit reached the same conclusion in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) regarding a buffer zone ordinance that similarly applies only outside of RHCFs. Like the

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. Because the Act is content neutral on its face and serves content-neutral purposes, it is content neutral even if it was passed to solve problems created by "the conduct of the partisans on one side of a debate," *Hill*, 530 U.S. at 724-25. "The [Massachusetts] statute is not limited to those who oppose abortion. It applies . . to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725.

Exemption Permitting Clinic Employees to Protect Patient Safety. The Act permits clinic employees or agents to be present in the buffer zone if "acting within the scope of their employment." Pet. 220a. The legislative history of the original Act shows that "clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs," including protecting them from "physical altercations" with protesters. *McGuire I*, 260 F.3d at 46 (cited at Pet. App. 171a-172a). "As the record reflects, the same is true today." Pet. App. 172a. As a result, this exemption furthers the legislative goal of ensuring the safety of patients

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Massachusetts statute, the Oakland ordinance does not apply at medical facilities generally, or even at hospitals where reproductive health care services are provided. *Id.* at 845. *Hoye* rejected the argument that the ordinance is content-based on its face merely because it applies only to the specific locations where it is most needed. *Id.* (citing *Hill*, 530 U.S. at 719-25).

seeking access to RHCFs. Pet. App. 106a. *See Hill*, 530 U.S. at 719-720 (goal of protecting access to health care facility is content-neutral).[7]

The exemption for clinic employees acting within the scope of their employment does not "create[] zones in which speech facilitating abortion access is permitted while speech about alternatives is banned." *Cf.* Pet. 19. "On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone." Pet. App. 173a. *See* Pet. App. 15a. The Massachusetts Attorney General informed law enforcement personnel that this exemption only allows "clinic personnel to assist in protecting patients and ensuring their safe access to clinics," and does not allow them to engage in the sort of pro-choice speech that Petitioners say would destroy the Act's viewpoint neutrality. *Id.* 173a-174a. Thus, the exemption does not convert the statute into a viewpoint-based regulation of speech. Pet. App. 105a-107a; 168a-174a; *McGuire I*, 260 F.3d at 45-47; *McGuire II*, 386 F.3d at 52 & n.1, 64.

The court below properly took cognizance of the Attorney General's content-neutral interpretation of the exemption. Pet. App. 119a. *See Ward*, 491 U.S. at 795-96 ("[i]n evaluating a facial challenge to a state

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[7] In this way the clinic employee exemption serves the same neutral purposes as the exemption in subsection (b)(3) of the Act for police officers. *See* Pet. App. 154a. Petitioners do not challenge the police officer exemption as viewpoint-based.

law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered"), quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc*, 455 U.S. 489, 494 n.5 (1982). *Accord, Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 456 (2008). Petitioners, however, ask the Court to ignore the Attorney General's guidance and construe the exemption to invite, not avoid, constitutional difficulties. Pet. 19-21. The Court should not accept this case on Petitioners' terms, which urge an "unnecessary pronouncement" on a constitutional issue and deprive the State of the opportunity to "implement [the exemption] in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450-51 (citations omitted). *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (warnings against "premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law . . . not yet reviewed by the State's highest court").

The finding below that the clinic employee exemption is viewpoint neutral on its face does not conflict with *Hill*, where no similar issue was present. And it is consistent with *Madsen*, which held that an injunction that applied a buffer zone only against anti-abortion protesters, but not against clinic employees, agents, or anyone else, was not viewpoint based. 512 U.S. at 762-63. Nor does the petition otherwise present a question concerning content neutrality that merits review.

III. There Is No Conflict in the Circuits Concerning the Act's Content-Neutrality.

Petitioners incorrectly portray the decision below as in conflict with *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011). Pet. 4, 24-25. The cases do not conflict and, to the extent that their outcomes differ, it is only because the operative facts differ. Both courts upheld, against facial challenges, a buffer-zone law that applied only at freestanding reproductive health facilities. But *Hoye* granted relief because the City conceded it discriminated in favor of clinic escorts in enforcement of the law. Here, Petitioners failed even to allege a lack of evenhanded enforcement, so no as-applied violation was found. Pet. App. 16a.

Hoye involved an Oakland ordinance similar to the floating buffer zone statute at issue in *Hill*. The Ninth Circuit held that the ordinance is content-neutral and constitutional on its face because it applies equally to "pro-abortion and anti-abortion advocacy." 653 F.3d at 845-849. The Massachusetts statute similarly makes no distinction based on the content of speech. In particular, the statutory exemption for RHCF employees and agents "does not permit advocacy of any kind in the zone" and does not allow "escorts with pro-choice viewpoints to express their views in the zone." Pet. App. 173a. *Accord McGuire I*, 260 F.3d at 45-48. The "[employee] exemption does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." Pet. App. 15a.

In *Hoye*, the court held that the Oakland ordinance was being applied in an unlawfully discriminatory

manner because local police were deliberately letting clinic employees or agents violate the law while barring pro-life protesters from doing so. 653 F.3d at 851-854. The city admitted that it consciously "enforces the ordinance in a content-discriminatory manner." *Id.* at 850. Here, in contrast, Petitioners "have not pleaded any facts that might suffice to ground a claim of uneven enforcement." Pet. App. 16a. There is no allegation that police were aware of and failed to act in the face of impermissible conduct by clinic employees or agents, or that the State has sanctioned conduct by employees or agents who abused their "exempt status . . . to advocate a particular point of view . . . ." Pet. App. 17a. The lower courts correctly held that *Hoye* is distinguishable on its facts. Pet. App. 16a-17a, 48a n.98.

Hoye itself explains that there is no conflict even though the First and Ninth Circuits take a "slightly different path" when considering a claim that a content-neutral law is being enforced in a discriminatory manner. 653 F.3d at 855. The First Circuit analyzes it as an "as applied" challenge to the law; the Ninth Circuit views it as a claim of "selective enforcement" under an equal protection analysis. *Id.* But "[a]ny difference between these two approaches is, at least in this case, semantic rather than substantive[,]" because under both "a plaintiff must show that a municipality's content discriminatory enforcement of an ordinance is the result of an intentional policy or practice." *Id.* (citing, *inter alia*, *McGuire II*, 386 F.3d at 63-64, and *Brown*, 586 F.3d at 292). In *Hoye*, that proof was "the City's own pronouncements," which "definitively articulate[d] a content discriminatory enforcement policy." *Id.* at 856.

"That policy is unconstitutional, no matter [which circuit's] analytical approach taken." *Id.*

The decision below is also consistent with the one other court of appeals decision addressing an "employee" exemption in a buffer zone ordinance. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3d Cir. 2009). *Brown* concerned a Pittsburgh ordinance that establishes a 15-foot buffer zone around entrances to hospitals and health care facilities. 586 F.3d at 266. The ordinance exempts "authorized security personnel employees or agents of the hospital, medical office, or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.* at 273-74. The City construed the exemption as only applying where clinic employees or agents are actually engaged in providing such assistance, but not as allowing an exempt person in the buffer zone to engage in "demonstrations or oral protest, education, or counseling with other individuals, including patients or other protesters." *Id.* at 274. The Third Circuit held that, especially with this construction, the provision is content-neutral. *Id.* at 274-75.

Thus, Petitioners do not identify any conflict in the lower courts concerning the Act's content-neutrality.

IV. That the Decision Below Addressed a Fixed (Rather than Floating) Buffer Zone Does Not Create a Conflict with *Hill v. Colorado*.

Petitioners and their *amici* have a heightened focus on this Court's decision in *Hill v. Colorado*. They argue (wrongly) that the decision below conflicts with *Hill* because the Massachusetts statute differs from the

Colorado statute upheld in that case. Pet. 7, 18, 22-23, 25-31. Review is not appropriate merely because the Massachusetts statute was revised to establish a fixed buffer zone very similar to the injunctions upheld in *Madsen* and *Schenck*, and to delete the floating buffer zone provision that had been modeled on the statute upheld in *Hill*.

A. *Hill* Does Not Foreclose a Fixed Buffer Zone Next to Clinic Entrances.

Petitioners incorrectly cite *Hill* for the proposition that the First Amendment bars any time, place, or manner regulation that has the effect of limiting communications with willing listeners. Pet. 5, 18, 27, 29-30. Because the Colorado statute, in certain circumstances, made it unlawful to approach within eight feet of another person without her consent, *Hill* addressed whether "the protection the statute provides for the unwilling listener" violated "the First Amendment rights of the speaker." *See* 530 U.S. at 708. The Massachusetts statute no longer has comparable restrictions on approaching listeners without their consent. But that difference from *Hill* does not raise a federal question that would warrant review.

The Court has repeatedly held that an appropriately tailored law may constitutionally bar protesters from approaching willing and unwilling listeners alike inside a fixed buffer zone, where there is ample opportunity to communicate from outside the zone. *See Schenck*, 519 U.S. at 374-76, 380-82 (15-foot buffer zone around RHCF entrances and driveways); *Madsen*, 512 U.S. at 768-70 (36-foot buffer zone around entire RHCF

property); *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (plurality upholding content-based statute that bars solicitation of votes and display of campaign materials within 100 feet of polling place); *id.* at 214-16 (Scalia, J., concurring on ground that statute was reasonable, viewpoint-neutral regulation of nonpublic forum).

The 2007 Act allows Petitioners to approach whomever they want, as closely as they want, and for any lawful purpose, so long as they do so outside the buffer zone. Pet. App. 38a, 110a-111a, 185a-186a. In addition, "[a]ny willing listener is at liberty to leave the zone, approach those outside it, and request more information." *Id.* 111a. That Petitioners and others may not enter the buffer zone – whether to approach willing or unwilling listeners – is a reasonable "place" restriction under *Ward*. It does not mean that the decision below conflicts with *Hill* or that it raises an important issue that would merit review.

B. *Hill* Does Not Establish an Absolute Right to Communicate From a "Normal Conversational Distance."

Nor did *Hill* recognize any absolute constitutional right to communicate from a "normal conversational distance" at all times or in all places within a public forum. Pet. 5, 7, 9, 29-31. It is true that *Hill* upheld Colorado's unusual 8-foot limit on unwelcome approaches within 100 feet of clinic entrances in part because it did not interfere with normal conversation. *Hill*, 530 U.S. at 726-27. But *Schenck*, *Madsen*, and *Burson* all upheld fixed buffer zones that had the effect

of limiting or precluding normal conversation within the zone.

That the Act may prevent Petitioners from engaging in close, personal conversations with clinic patients in the buffer zone does not undermine its validity. The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (upholding state fair rule barring sale or distribution of leaflets and literature, except from fixed location). The Court has long made clear that legislatures may enact content-neutral laws that restrict the time, place, or manner of speech in public fora in order to protect the public health, safety, or convenience. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). Such laws "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798).

Petitioners conceded below that "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to clear out "the bottleneck . . . immediately adjacent to the doors and to the driveways [of clinics]," and that these are both "legitimate interest[s]." Pet. App. 178a; *accord Hill*, 530 U.S. at 715. Because the Act protects only the clinic entrances and driveways where there was a history of physical obstruction, close-quarter confrontations, and other public safety problems, it does not burden substantially more speech than necessary. Pet. App. 108a-109a, 179a-181a. The fact

that the Act limits or forecloses Petitioners' ability to speak to prospective patients at a conversational distance while at the entrances to RHCFs does not implicate an issue that warrants this Court's review.

V. There is No Reason for this Court to Review the Fact-Bound Question of Whether Petitioners Have Adequate Alternative Channels of Communication at Three Dissimilar Clinic Sites.

Following a bench trial, the district court issued extensive, detailed findings upon which it concluded that the revised Act leaves open ample alternative channels of communication for Petitioners at clinics in Boston, Worcester and Springfield. Pet. App. 39a-66a. After reviewing that determination *de novo*, the court of appeals affirmed. Pet. App. 20a-26a. The petition does not identify an important federal question arising out of the court of appeals' fact-bound consideration of the adequacy of alternative avenues of communication at each clinic site.

A State's regulation of the time, place or manner of expression must "leave open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Such a law does not fail for lack of adequate alternatives if there are avenues for "the general dissemination of a message." *Frisby*, 487 U.S. at 483-84 (upholding ban on picketing before any particular residence where protesters could enter neighborhoods to "march," "go door-to-door," "distribute literature" in person or by mail, or "contact residents by telephone").

That a law "may reduce to some degree the potential audience for [Petitioners'] speech is of no consequence" if, as in this case, "there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 491 U.S. at 802.

On its face, the revised Act does not prohibit any manner of speech, and leaves open ample alternatives. *Cf.* Pet. 31. Petitioners and others may hold signs, pray, sing, or chant just outside of RHCFs, and may converse with or offer literature to persons approaching or leaving clinics. Pet. App. 110a-111a. They may engage in a full range of expressive activity that can be seen and heard by people approaching, and inside, the buffer zone. Pet. App. 110a-111a. Pet. App. 110a-111a.[8]

Moreover, the evidence demonstrates that Petitioners, in fact, do share their message with their intended audience—women seeking abortions—while standing outside the Boston, Worcester, and Springfield clinics.

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[8] Petitioners are mistaken when they argue that *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), shows that alternatives at the three sites are lacking. Pet. 34-35. *Gilleo* struck down a municipal ordinance that banned residential signs after considering "the peculiar characteristics of home-lawn signs and the 'special respect for individual liberty in the home.'" Pet. App. 25a (discussing *Gilleo*, 512 U.S. at 56-58). The Court contrasted this unique interest with "the government's need to mediate among various competing uses, including expressive ones, for public streets, which is constant and unavoidable." *Gilleo*, 512 U.S. at 58. The present case falls squarely in the latter context.

At the Boston clinic, petitioners McCullen and Cadin continue to succeed in convincing pregnant women that they meet outside the buffer zone not to have abortions. Pet. App. 41a-42a, 45a-46a. They and Ms. Zarella share their pro-life views through close personal contact and conversation, and by handing literature to, people approaching the clinic. Pet. App. 41a-46a. Other anti-abortion protesters and counselors communicate with clinic patients by displaying signs, calling out to passersby, engaging willing listeners in conversation, and participating in group prayer and demonstrations on the sidewalk near the clinic entrance. Pet. App. 41a-50a.

At the Worcester and Springfield clinics, the "main impediment to communicative activity" is not the application of the Act, but rather the "physical characteristics of the sites." Pet. App. 24a. Most patients at these clinics arrive by car and park in private lots with direct access, over non-public walkways, to the clinic entrance. *Id.* "That patients choose to stay on private property or not to stop their cars on approach is a matter of patient volition, not an invidious effect of the Act." *Id.* Even if there were no buffer zone, Petitioners would generally not have an opportunity to engage in close, personal conversations with patients who arrive at these clinics by car and park in private lots with direct clinic access.

Nonetheless, Petitioners Bashour and Clark can and do share their pro-life views at the Worcester clinic by offering conversation and literature, and clinic patients on clinic property can hear those offers. Pet. App. 52a-57a. Despite the buffer zone, Bashour and Clark have been able to convince women not to have an

abortion or to go to a nearby pro-life center. Pet. App. 52a-56a. Other anti-abortion protesters at the Worcester clinic communicate with patients from outside the two buffer zones by using signs, calling out to people entering or leaving the RHCF, engaging in group prayer and demonstrations, and even dressing as the "Grim Reaper." Pet. App. 52a-57a.

At the Springfield clinic, petitioner Shea walks on the sidewalk wearing a sign saying "They're Killing Babies Here," which people see and react to. Pet. App. 61a-62a. Other anti-abortion protesters also hold signs and offer literature from the sidewalk near the clinic's driveway. Pet. App. 62a-63a. Dr. Shea also testified that some people who park in the private lot walk out to the sidewalk to speak with or take literature from a pro-life counselor. Pet. App. 62a.

In sum, the evidence makes clear that Petitioners can and do share their message with RHCF patients at the clinics in Boston, Worcester and Springfield. The petition identifies no pressing federal question respecting the availability of adequate alternative avenues of communication; it merely asks the Court to reconsider fact-specific determinations by the lower courts involving these three sites. Accordingly, review is unwarranted.

VI. This Case is Not a Vehicle For Revisiting *Hill*.

The Court should also reject Petitioners' and *amici*'s invitations to take this case in order to revisit and overrule *Hill*. Pet. 26 and Brief of Richard W. Garnet, et al. as Amici Curiae 4-11. There is no reason to reconsider *Hill* and, in any event, this case does not provide a vehicle for doing so.

First, and foremost, there are important differences between the Massachusetts Act and the Colorado law reviewed in *Hill*. While the original Massachusetts Act was modeled on the *Hill* statute, the 2007 Act substitutes a 35-foot fixed buffer zone at the clinic entrances that excludes all non-exempt individuals, without regard to whether they are engaged in any kind of speech or communicative activity. The law reviewed in *Hill* created a 100-foot restricted area outside the entrances to all health care facilities; within this area a floating, 8-foot buffer zone protected individuals from unconsented approaches by others for the purposes of "protest, education, or counseling." 530 U.S. at 707-08. These differences would preclude meaningful reconsideration of *Hill* in the present case.

In particular, this case provides no opportunity to reconsider one of the main issues that divided the Court in *Hill*: whether the Colorado statute was content-based because it restricts certain kinds of communications ("protest, education or counseling") but not others. *See Hill*, 530 U.S. at 720-25 (majority), 742-749 (Scalia, J., dissenting, with Thomas, J.), and 765-770 (Kennedy, J., dissenting). The Massachusetts Act is a traditional time-place-manner regulation that

does not restrict any particular message or any mode of communication; it merely sets a small area near clinic entrances and driveways that non-exempt persons may not enter during business hours. Pet. App. 37a-38a.

Finally, it would make no sense to grant the petition in order to reconsider *Hill*, because the Massachusetts Act can, in any event, be upheld under the Court's fixed buffer zone cases, *Madsen* and *Schenck*, and time-place-manner cases, such as *Ward*. Petitioners do not question the vitality of these cases, which continue strongly to support the Act's validity. *See, e.g.*, *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) (citing *Madsen* as a situation where "the location of targeted picketing can be regulated" under content neutral provisions that "requir[e] a buffer zone between protesters and an abortion clinic entrance").

In sum, the Court should not reconsider *Hill* and, even if that were warranted, this case would not provide the opportunity.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 24, 2013

REPLY BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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A Massachusetts criminal statute establishes different rules for different speakers on public sidewalks near abortion clinics. Petitioners, who wish to offer women alternatives to abortion, may not enter parts of public sidewalks to speak—no matter how peaceful, respectful, or consensual the speech. The State will let them walk silently past the abortion clinic to go elsewhere, but threatens prison if they so much as utter "May I help you?" while they walk. Employees and agents from abortion clinics, however, are expressly authorized to enter and speak on the same sidewalks, so long as they are conveying the abortion clinics' message.

This case presents the simple question: can Massachusetts constitutionally impose this type of selective prohibition on petitioners' peaceful speech with willing listeners in the public forum?

Both the State and the lower courts have defended this differential treatment as neutral and unproblematic under this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000). But the Massachusetts statute is not neutral and goes far beyond *Hill*. Indeed, the Ninth Circuit rejected an indistinguishable government preference for abortion-clinic speakers as "indubitably content-based" and the "epitome" of a content-based restriction. *See Hoye* v. *City of Oakland*, 653 F.3d 835, 851-852 (9th Cir. 2011).

Respondents' brief in opposition argues that this Court should deny review because (a) the Massachusetts employee exemption is statutory, rather than an enforcement policy as in *Hoye*, Opp. 1, 23-25; (b) respondents say they have "interpreted" the statute to make it neutral, claiming authority to prosecute abortion-clinic agents who speak on certain topics, Opp. 21-22; *see* Pet. App. 119a (interpreting statute to prohibit

clinic speakers from "express[ing] their views about abortion or ... engag[ing] in any other partisan speech within the buffer zone"); and (c) a fixed buffer zone statute should be analyzed under injunction precedents like *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network*, 519 U.S. 357 (1997), rather than *Hill*, Opp. 1, 14-16, 26-28, 34.

These arguments fail. First, whether a State's favoritism for abortion-clinic speakers is spelled-out in statutory text (as here) or adopted as an enforcement policy (as in *Hoye*) is a distinction without a difference. The circuit conflict is over whether the favoritism itself is permissible under the First Amendment. Second, respondents cannot fix the statute's discriminatory treatment by pretending that they have the authority to prosecute speakers the statute expressly exempts. Third, the Massachusetts statute must be measured by the standard established in *Hill*, not by the specialized standards that *Madsen* and *Schenck* establish for injunctions against specific, repeat law-breakers.

Respondents' claim that "nothing has changed to make the case more deserving of review" since 2010, Opp. 13, is incorrect. In 2010, respondents argued that review was premature because the petition was interlocutory and there was no factual record "regarding the actual effects of the revised Act." No. 09-592 Opp. 34-35. Moreover, the Ninth Circuit had not yet rendered its decision in *Hoye*. All of these concerns have been resolved, and the case is now fully ready for review.

Ultimately, the opposition confirms why this Court should grant review. For more than a decade, Massachusetts and other jurisdictions have used this Court's cases as a purported license to create special speech rules near abortion clinics, criminalizing peaceful speech

with willing listeners on public sidewalks. They have done so selectively, based on impermissible government judgments about whose message is more welcome or more valuable. This Court should grant *certiorari* to resolve the conflict that now exists and make clear that *Hill* does not allow what Massachusetts has done.

I. THE CONFLICT WITH *HOYE* WARRANTS REVIEW

Respondent denies a conflict with *Hoye* by claiming that (a) *Hoye* involved an enforcement policy, not a statutory exemption; (b) the Massachusetts exemption does not allow pro-choice speech; and (c) respondents have interpreted away any facial problem with the statute. Opp. 1, 21-23. These arguments are unavailing.

A. The Discrimination In *Hoye* Is Indistinguishable From The Discrimination In *McCullen*

The State argues that *Hoye* struck down a discriminatory enforcement policy, rather than a law that discriminates on its face. Opp. 23-25. But Oakland's enforcement policy matches precisely the statutory distinction the State defends here: abortion-clinic speakers are able to move and speak freely on clinic business, while others can be imprisoned for offering an alternative message on the same public sidewalk.

Indeed, when the district court in *Hoye* upheld Oakland's discriminatory policy, it did so based on the First Circuit's analysis *in this case*. *Hoye* v. *City of Oakland*, 642 F. Supp. 2d 1029, 1038 (N.D. Cal. 2009). The Ninth Circuit's reversal of that approach as the "epitome" of a content-based distinction had nothing to do with the particular *source* of the discrimination (text or enforcement policy), and everything do to with the simple principle

that the government is not permitted to favor some private speakers over others on public sidewalks. *Hoye*, 653 F.3d at 851-852 (preference for access-facilitating speech violates *Hill*). As the Ninth Circuit explained:

> To distinguish between speech facilitating access and speech that discourages access is necessarily to distinguish on the basis of substantive content. Asking a woman "May I help you into the clinic?" facilitates access; "May I talk to you about alternatives to abortion?" discourages it.

Id. (holding distinction "indubitably content-based"). The First Circuit found the same discrimination constitutionally unproblematic. Pet. App. 172a.

Furthermore, the effects of this discrimination are as real in Massachusetts as they were in Oakland. While petitioners are occasionally able to reach some listeners with speech outside the zones, undisputed facts show that petitioners' ability to help women is severely curtailed by forcing them to stand outside the State's painted lines. Pet. 12-14. At the same time, abortion-clinic speakers use their statutory advantage to offer the clinics' message and discourage women from listening to petitioners. *See* Pet. 15 (*e.g.*, "don't listen to her"); C.A. Joint Appendix 241 (documenting statements by abortion-clinic speakers in buffer zones: "abortion is legal," "it's important for women to have a choice," "we have help," or "we'll help you get inside"). Respondents do not mention (let alone dispute) this evidence.[1]

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[1] Respondents' argument that petitioners should have called the police to report abortion-clinic speakers using the statutory exemption, Opp. 12 n.2, makes no sense. How and why would anyone report *legally protected* behavior to the police? *See infra* Part I.C.

This is precisely the type of favoritism correctly rejected as "indubitably content-based" in *Hoye*. The State may neither strip petitioners of their equal right to speak on the public sidewalk, nor substitute its own preferences for the right of women to determine for themselves what speech and speakers are worthy of consideration. *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("It is now well-settled that the Constitution protects the right to receive information and ideas."). Such interference with the marketplace of ideas cannot be reconciled with *Hoye*, or with a proper understanding of this Court's precedents.

B. The Exemption Allows Abortion-Clinic Speech In The Zones

The State's effort to avoid this conflict by claiming the exemption does not permit employee speech is equally unconvincing. The statutory exemption is comprehensive: employees and agents acting for the clinic are exempt from the law for all purposes, and there is no basis for arguing that this does not include speech. *See* Mass. Gen. Laws c. 266, § 120E ½(b)(2) (Pet. App. 219a-221a). The sole limitation in the exemption—that employees or agents must be acting "within the scope of their employment" for an abortion clinic—serves only to ensure that their speech will present the clinic's point of view. For clinic agents on their employer's business, the public sidewalk outside the clinic is like any other in the nation: a place "historically associated with the free exercise of expressive activities" and therefore "considered, without more, to be [a] public forum." *United States* v. *Grace*, 461 U.S. 171, 177 (1983) (internal citations omitted). The exemption thus permits abortion clinic representatives to speak with impunity, while pe-

titioners would face prison for peacefully offering alternative choices on the same public sidewalk.

Moreover, respondents' current contention that the statute is a content-neutral time, place, and manner restriction is belied by the fact that respondents have long defended the exemption—which first appeared in the 2000 statute that was the subject of the *McGuire* cases—as a permissible "distinction[] based on the *speaker*." *See McGuire* v. *Reilly*, Reply Brief of Defendants-Appellants, *available at* 2001 WL 36026241, at *9 (arguing, before this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310, 340-341 (2010), that this Court had allowed "distinctions based on the *speaker*" where "the distinction is made for reasons other than the content of the *speaker's speech*" (emphasis added)). The speaker exemption was also justified below based on government predictions about how clinic speakers would use their speech rights, and what speech listeners would welcome. *See, e.g.*, Pet. App. 172a (legislature "could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners"); Pet. App. 169a, 170a-171a (legislature likely exempted clinic speakers "in order to make crystal clear what was already implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution").

C. The Exemption Cannot Be Interpreted Away

Finally, respondents cannot fix the Act by resurrecting their litigation-driven "interpretation" of the employee exemption. They claim the law is neutral because the Attorney General issued "guidance" purporting to limit the permissible topics for clinic speech. Opp. 21; Pet. App. 119a (clinic speakers may not express "views about

abortion" or other "partisan speech"). This argument implicitly acknowledges, but cannot cure, the statute's obvious constitutional infirmity.

The proposed "interpretation" is plainly unenforceable. The government could never indict or convict a clinic speaker for talking about disfavored topics in violation of the Attorney General's guidance. The speaker has been given a complete defense both by the legislature (in the form of an unambiguous statutory exemption) and by the First Amendment (which forbids such patently content-based regulations of speech). Indeed, respondents themselves told the First Circuit there was no evidence "that any police department or official enforced the Act any differently because of the January 2008 guidance letter." Appellee C.A. Br. 42. This makes sense: while a prosecutor may at times offer a *narrowing* interpretation of a law in an attempt to preserve its constitutionality, respondents here assert an ability to *broaden* the scope of a criminal prohibition. Prosecutorial discretion does not include the power to prosecute people whom the legislature protected from liability. *Cf.* Pet. App. 169a, 170a-171a (legislature likely exempted clinic speakers "in order to make crystal clear what was already implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution").[2]

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[2] Even on its own terms, respondents' "interpretation" is hopelessly overbroad and content-based, as it purports to regulate even the content of speech of people legally walking through the zones to go elsewhere. In oral argument below, for example, they conceded that on their view it could be unlawful to wear a Cleveland Indians shirt while walking through the zone. *See* 2009 WL 1346643, at *9 (admitting an Indians fan could "possibly" be arrested for wearing the shirt). The trial court found, with more certainty, that the Act and interpretation "clearly" prohibit the wear-

The only possible reason the State would resort to such an obviously unenforceable "interpretation" is to try to fix the law's glaring constitutional infirmity. The attempt is therefore "pertinent only as an implicit acknowledgment" of the obvious "constitutional problems with a more natural reading." *United States* v. *Stevens*, 130 S. Ct. 1577, 1590-1592 (2010).

II. This Case Is An Ideal Vehicle For Clarifying The Scope Of *Hill*

Respondents' opposition shows why this case is a good vehicle for clarifying the scope of *Hill*. Respondents argue, for example, that *Hill* does not even apply here because this case presents a fixed buffer zone, rather than a "no-approach" floating buffer zone, and that this case therefore should be decided under injunction cases like *Madsen* and *Schenck*. Opp. 1, 14-16, 26-28, 34. That argument is plainly wrong, and respondents' attempt to rely upon it shows that, thirteen years after *Hill*, the Court needs to clarify and reinforce *Hill*'s core limitations. Opp. 33-34.

Hill remains the appropriate framework for decision here. Indeed, respondents originally argued that the Act modified "only the size and nature of the buffer zone ... [but in] all other respects ... remained identical" to the no-approach floating buffer laws. Dist. Ct. Opp. To Prelim. Inj. 1-2. Moreover, both lower courts relied heavily *Hill* (both directly and through their earlier *McGuire* decisions). Pet. App. 99a-115a, 159a-191a.

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ing of shirts "with abortion-related" messages while passing through the zones. Pet. App. 205a-206a. Likewise, the First Circuit explained that while the "guidance" may be somewhat vague, petitioners "must know" that their "anti-abortion" message "falls within the hard core of the proscriptions spelled out in the guidance letter." Pet. App. 117a.

As set forth in the petition, however, *Hill* cannot support the Act, because *Hill* carefully preserved speakers' rights to speak with willing listeners, to distribute handbills, and to address even unwilling listeners from a "normal conversational distance." Pet. 29 (citing *Hill*, 530 U.S. at 726-727). Moreover, *Hill* emphasized that reduced scrutiny applied only because the law broadly covered all medical facilities (not merely abortion clinics) and because it applied equally to all speakers. The Act violates each of these principles. Pet. 15.

Realizing that *Hill* cannot support the Act, respondents seek refuge in injunction cases like *Madsen* and *Schenck*. Opp. 14-16, 25-28, 34. They seize on language in *Madsen* suggesting that injunctions, because of their targeted nature, require greater scrutiny than statutes to guard against impermissible discrimination (Opp. 15), suggesting that this means any speech restriction is necessarily permissible if it is less onerous than one approved for an injunction against specific past violators. *Id.*; *see also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (fifteen foot zone "a fortiori" permissible as a statute because of *Madsen* and *Schenck*; "This conclusion is bolstered by the First Circuit's recent decision in *McCullen*[.]").

Respondents' argument proves far too much. That courts are particularly cautious about imposing speech-restrictive injunctions does not mean that a State may impose on all citizens by statute any restriction that a court could constitutionally tailor to an individual based on proof of particular past misbehavior. Indeed, if respondents' analysis were correct, statutes requiring all speakers to remain at least 100 feet away from actress Halle Berry, and at least ten feet from all Church of Scientology buildings, would also be constitutional, because injunctions against particular individuals have

issued with those terms. *See* AP, *Celebrity Obsession*, Chicago Trib., Mar. 8, 2005, *available at* 2005 WLNR 23471400; Sommer, *Scientology Opponent Faces Battery Charge*, Tampa Trib., Jan. 15, 2000, *available at* 2000 WLNR 67940. Similarly, *Hill* would have been an open-and-shut case unworthy of review, because its 8-foot separation zone is far less than the 36 feet approved in *Madsen*. Obviously, *Madsen* required no such result. *Cf. Madsen*, 512 U.S. at 778 (Stevens, J., concurring and dissenting in part) ("a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment"). Far from trumping *Hill*, *Madsen* and *Schenck* are largely inapposite. They concerned targeted equitable relief on "extraordinary" records to prevent specific prior lawbreakers from future violations. *See Schenck*, 519 U.S. at 380-383; *Madsen*, 512 U.S. 766 n.3.[3]

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[3] Respondents' reliance on *Burson* v. *Freeman* is likewise misplaced. *Burson* upheld a 100-foot buffer zone around polling places, but the speech restriction was even-handed and not viewpoint-based like the Massachusetts statute: it did not focus on particular issues and applied equally to anyone campaigning or soliciting votes without exceptions for preferred speakers. 504 U.S. 191, 193-194 (1992). Furthermore, *Burson* subjected the restriction to strict scrutiny, and the restriction survived only because the plurality believed it narrowly tailored to "compelling interests in preventing voter intimidation and election fraud." *Id.* at 210-211. The State has never tried to justify the Massachusetts statute under strict scrutiny, and indeed, the State's only alleged justification for the law—alleged but unproven difficulties with enforcing the prior no-approach floating buffer zone law (Pet. 6)—would never survive strict scrutiny, particularly in light of the State's failure to identify any similar inability to enforce laws directly targeting interference with access. *See, e.g.*, *NAACP* v. *Claiborne Hardware*, 485 U.S. 886, 888, 916-917 (1982) (noting protest included "elements of criminality and elements of majesty" and that the First Amendment "demand[s]" "precision of regulation" to sort between the two);

This case remains an ideal vehicle for clarifying or reinforcing *Hill*'s core limitations—the focus on only unwilling listeners, the broad application at all medical facilities and not just abortion clinics, and universal application to all speakers. Massachusetts abandoned all those limits here. And the fact that governments in Massachusetts, California (*Hoye*), and Vermont (*Clift* v. *City of Burlington*, 2013 U.S. Dist. LEXIS 21888 (D. Vt. Feb. 19, 2013)) have all read *Hill* to permit dramatically more severe restrictions on speech confirms the need for this Court to clarify and strengthen this area of the law.[4]

Brown v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011) (government "bears the risk of uncertainty" and "ambiguous proof will not suffice"). In the end, respondents remain unable to cite a single case from this Court approving a statute remotely like the one it now defends.

[4] *See also Ross* v. *Early*, 758 F. Supp. 2d 313, 322 (D. Md. 2010) ("There is, therefore, no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message." (citing *McCullen* v. *Coakley*, 571 F.3d 167, 180 (1st Cir. 2009) ("[H]andbilling is not specially protected."))).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA,
GREGORY A. SMITH, MARK BASHOUR, AND
NANCY CLARK,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR
THE COMMONWEALTH OF MASSACHUSETTS, *et al.*
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have consented to the filing of this brief, and their written consents have been filed with the Court. No counsel for a party authored the brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

including – most relevant to this case – *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005), reprinted in FIRST AMENDMENT LAW HANDBOOK 314 (Rodney A. Smolla ed. 2005-06). He is also the author of THE FIRST AMENDMENT AND RELATED STATUTES: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS (Foundation Press, 3d ed. 2007). Professor Volokh is counsel of record in *Scott v. St. John's Church in the Wilderness*, No. 12-1077, *cert. pending*. He joins this brief in his capacity as an academic rather than an advocate, having previously joined in a law professors' brief in support of certiorari at an earlier phase of this case. *See* Br. of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McCullen v. Coakley*, No. 09-592.

SUMMARY OF ARGUMENT

This Court granted certiorari in *Hill v. Colorado* "[b]ecause of the importance of the case." 530 U.S. 703, 714 (2000). The Court should grant certiorari in this case because of the importance of placing limits on *Hill*.

The Court does not need to overrule *Hill* to contain the damage wrought by the First Circuit's expansion of it. But the Court should contain *Hill* and thereby prevent further erosion of First Amendment protections for public-forum speech. The challenged Act prohibits stationary handbilling and conversational speech within fixed exclusion zones on public sidewalks near abortion clinics. The Act is not narrowly tailored to governmental interests in protecting unwilling listeners from close physical approaches or in preserving access to abortion clinics.

REASON FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO PLACE CLEAR LIMITS ON *HILL V. COLORADO*.

This fully developed constitutional challenge to Massachusetts' public-sidewalk exclusion zones presents an excellent vehicle for limiting *Hill v. Colorado*, 530 U.S. 703 (2000). *Hill* upheld a restriction on close physical approaches to unwilling listeners on public sidewalks outside of medical facilities. The decisions in this case expand *Hill* well beyond its approach-based rationale and provide a blueprint for future government suppression of public-forum speech.

The Act challenged in this case began as a no-approach statute modeled on Colorado's. Massachusetts later amended that speech restriction to make it easier for the police to enforce.[2] The amended version eased enforcement by making it a crime even to remain stationary and hold out literature or offer help in a normal conversational tone on public sidewalks off Boston's Commonwealth Avenue and other public ways throughout the State. Under this amended Act, Petitioners' free-speech rights had tumbled to the bottom of *Hill*'s slippery slope.

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[2] The law permitted approaches with consent and police could not always easily determine the presence or absence of consent. *See* App. 146a. ("Mainly, the police had trouble determining whether a protester had 'approached' a person within the six feet floating buffer, without that person's consent.")

By treating the ease of enforcing an existing public-forum speech prohibition as a justification for enacting an even broader speech restriction, Massachusetts adopted a "prophylaxis-upon-prophylaxis approach" condemned by this Court's First Amendment jurisprudence in other contexts. *Federal Election Comm'n v. Wisc. Right to Life*, 551 U.S. 449, 479 (2007). Yet the First Circuit upheld the challenged Act by recourse to this Court's "well-settled abortion clinic/buffer zone jurisprudence." App. 12a. This Court should prevent further expansion of the State's speech-restrictive logic by granting certiorari and holding that the challenged Act is not narrowly tailored to governmental interests in protecting unwilling listeners from close physical approaches or in preserving access to freestanding medical facilities that perform abortions.[3]

This Court has "applied the captive audience doctrine only sparingly to protect *unwilling listeners* from protected speech." *Snyder v. Phelps*, 131 S.Ct.

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[3] By granting certiorari in this case, the Court can also clarify the criteria for assessing content- and viewpoint-neutrality under *Hill*. As the petition for certiorari observes, the Act's singling out of abortion protesters for special speech rules is impossible to ignore given that its exclusion zones (i) apply only at freestanding clinics that perform abortions, and (ii) do not apply to the activities of clinic employees and agents. By contrast, the Colorado law upheld in *Hill* applied at all medical facilities, *see Hill*, 530 U.S. at 708 n.1, and applied equally to "all 'protest,' to all 'counseling,' and to all demonstrators . . . whether they oppose or support the woman who has made an abortion decision." *Id.* at 725. Whether *Hill* permits Massachusetts' abortion- and speaker-specific speech restrictions to stand without enduring strict scrutiny raises a significant question that warrants this Court's review.

1207, 1220 (2011) (emphasis added). But the First Circuit's decisions below have expanded the doctrine to encompass even *willing listeners*. The well-developed record in this case shows that many women have accepted petitioners' conversational offers of help outside of the covered abortion clinics. Yet the Act here contains no consent provision that allows petitioners to enter or remain in an exclusion zone while communicating with a willing listener. Instead, petitioners must communicate from outside the painted lines that mark the exclusion zones' boundaries.[4] This "bright-line rule" violates the First Amendment, for the Act is not narrowly tailored to the governmental interest in protecting unwilling listeners from close physical approaches recognized in *Hill*. *See Hill*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").

This Court recognized in *Hill* that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and [that] to do so there must be opportunity to win their attention.'" 530 U.S. at 728 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The statute in *Hill* explicitly permitted a speaker to approach another person within 8 feet for

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[4] Massachusetts' expansion of its speech limits has had a profound effect on petitioners' speech. For example, "Plaintiff Zarrella—an 85-year-old grandmother who offers help on Saturdays and some Wednesdays—testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction with an incoming woman since the Act took effect—after more than 100 successful interactions before the Act." Petn. at 14-15.

the purpose of communicating if the "other person consents" to the approach. Colo. Rev. Stat. § 18-9-122(3). Although the challenged statute inhibited a speaker's ability to reach *unwilling listeners*, the statute preserved a speaker's ability to reach *willing listeners*, and the Court emphasized the importance of this distinction to the disposition of the case.[5]

Even if the State believed that enforcement difficulties associated with a consent-based approach system could justify a ban on approaching people with their consent outside of abortion clinics, it would suffice to require speakers to remain stationary. To draw zones that exclude pro-life speakers completely is not a narrowly tailored response. A requirement to remain stationary while speaking or handbilling would prevent unwanted approaches. And a rule prohibiting obstruction would ensure unfettered access. Indeed, well before Massachusetts enacted either the challenged Act or its abortion-facility-specific predecessor, the State

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[5] The Court framed the question as "whether the Colorado statute reflects an acceptable balance between constitutionally protected rights of law-abiding speakers and *the interests of unwilling listeners*." *Hill*, 530 U.S. at 714 (emphasis added). The Court emphasized: "It is also important when conducting this interest analysis to recognize the *significant difference* between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. *This statute deals only with the latter*." *Id.* at 715-716 (emphases added). Moreover, in considering whether the statute was "narrowly tailored," the Court thought that it was "worth reiterating that only attempts to address *unwilling listeners* are affected" by the statute. *Id.* at 727 (emphasis added). With respect to citizens' rights to "reach the minds of willing listeners," the Court concluded that the "Colorado statute adequately protects those rights." *Id.*

already had on its books a more general rule prohibiting obstruction of access to medical facilities. *See* Mass. G.L. C. 266, § 120E (prohibiting obstruction of "entry to or departure from any medical facility"). Unlike its abortion-facility-specific counterpart, that law expressly preserves speakers' "rights to engage in peaceful picketing which does not obstruct entry or departure." *Id.*

Even if the challenged Act's criminalization of consented-to approaches on public sidewalks is thought to be consistent with the First Amendment's freedom of speech, the Act nevertheless fails *Hill*'s narrow tailoring requirement because it prohibits stationary handbilling and conversational speech in the exclusion zones. The Court's opinion in *Hill* noted that Colorado's challenged "8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-27 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)). The Court further observed that "the statute does not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept." *Id.* at 727.[6] Justice Souter's concurring opinion in *Hill*, which Justices O'Connor, Ginsburg, and Breyer joined, singled out the statute's preservation of similar speech freedoms. Justice Souter explained that "the fact that *speech by a stationary speaker is untouched* by this statute shows that the reason for its restriction on

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[6] *See also id.* ("The statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute.").

approaches goes to the approaches, not to the content of the speech of those approaching." 530 U.S. at 738 (emphasis added).[7] These opinions' emphasis on the preservation of stationary handbilling and speech from a normal conversational distance was presaged in questioning by multiple Justices from the *Hill* majority at oral argument.[8]

Legal scholars from across a broad ideological spectrum have criticized *Hill* for ratcheting down standard First Amendment analysis of public-forum speech restrictions. One scholar has pithily described the decision as "slam-dunk simple and slam-dunk wrong." Laurence Tribe, *quoted in Colloquium*, 28 Pepp. L. Rev. 747, 750 (2001). Others have criticized *Hill* on the grounds that it:

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[7] *See also Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*.") (emphasis added)..

[8] *See* Oral Arg., *Hill v. Colorado*, No. 98-1856, 2000 WL 72054, at *2 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *6 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully."); *id.* at *7 (Breyer, J.) ("What's the problem if I can stand still, hand [out a leaflet] just like this, and she'd have to walk around in order to avoid taking it, but she's free to walk around under this statute?"); *id.* at *9 (Stevens, J.) ("I'm concentrating on the leafleting now because, it seems to me, that's your strongest argument.").

(i) obscured the distinction between content-neutral and content-based restrictions on speech;[9]

(ii) inverted ordinary First Amendment principles by imposing a "listener preclearance requirement";[10]

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[9] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1127 (2005) (pointing out that in *Hill* "one must necessarily examine the content of a person's speech to determine if it constitutes 'education, protest or counseling'"); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1400-1406 (2002) (conducting thorough inquiry into why statute in *Hill* was content-based); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."); McConnell, 28 PEPP. L. REV. at 748 ("You cannot tell, other than by the content of what I say, whether the law [in *Hill*] is being violated or not. Now if that is not content-based, I just do not know what 'content-based' could possibly mean."); *cf.* Erwin Chemerinsky, *Colloquium*, 28 PEPP. L. REV. 747, 752-753 (2001) (agreeing with the result in *Hill* but disagreeing with the Court's rationale: "Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. . . . [and] this case further adds to the confusion . . . .").

[10] Sullivan, 28 PEPP. L. REV. at 737 ("*Hill* is unusual . . . with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that,

> (iii) illustrated "how far the Court has allowed overbreadth to drift from its central premises";[11] and
>
> (iv) recognized "a public 'right to be let alone' [that] is in tension with literally decades of First Amendment jurisprudence."[12]

More important than what these scholars have said about *Hill* is what lower courts have done with it. *See* Petn. at 25-27. And the decisions in this case show how *Hill* created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places."[13] This Court should grant certiorari to place clear limits on *Hill*.

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in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); McConnell, 28 PEPP. L. REV. at 748 (agreeing that "one of the ways in which *Hill v. Colorado* inverted ordinary free-speech principles" was "by rejecting the principle that it is the person—it's the unwilling listener—who has the burden of action, and not the speaker").

[11] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 72 (2003).

[12] TIMOTHY ZICK, FREE SPEECH OUT OF DOORS 101 (University of Cambridge Press, 2008).

[13] Clark LeBlanc & Jamin B. Raskin, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U. L. Rev. 179, 182 (2001).

CONCLUSION

Amici respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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April 24, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

APR 24 2013

No. 12-1168

IN THE
SUPREME COURT OF THE UNITED STATES

ELEANOR MCCULLEN, *et al.*,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICI CURIAE* LIFE LEGAL DEFENSE FOUNDATION AND WALTER B. HOYE II IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead to seek out ways to make this expressive activity unlawful.

Amicus Walter B. Hoye II is an individual whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community through public

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation of this brief.

speaking and his web site, Rev. Hoye seeks to offer immediate assistance to women seeking abortion, a message he conveys by engaging in one-on-one conversations with them as they approach an abortion clinic in Oakland, California.

In December 2007, the city of Oakland passed an ordinance, similar to the statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), but applying only to non-hospital-affiliated abortion clinics. Rev. Hoye immediately challenged the ordinance in federal court. In 2011, the Ninth Circuit ruled that the ordinance was being enforced unconstitutionally, in that the city's enforcement policy exempted speech "facilitating access" from prosecution. However, the court upheld the ordinance on its face, despite its narrow application to abortion facilities. *Hoye v. Oakland*, 653 F.3d 855 (9th Cir. 2011).

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the ordinance. No patient or other person seeking access to the clinic complained of his conduct, nor did any purported "victim" testify against him at trial. Indeed, no "victim" was ever specified. Though the conviction was appealed (and ultimately overturned on procedural grounds), the trial court refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years. Rev. Hoye did not agree.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail.

Rev. Hoye completed his sentence.

In sum, Rev. Hoye was threatened with two years in jail and in fact went to jail for engaging in undisputedly peaceful, non-obstructive constitutionally protected speech activity on a public sidewalk. Twenty years ago, one would have wondered how that could happen. Now we know the answer: abortion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 20 years ago, this Court decided *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), upholding an injunction that imposed, *inter alia*, a 36-foot speech-free zone around the entrance to an abortion clinic. This Court employed a newly-minted test for assessing the validity for injunctive restrictions on speech: whether the restriction burdens no more speech than necessary to serve significant governmental interests.

Six years later, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a state statute creating unique restrictions on core speech activity (leafleting, picketing, and engaging in oral protest, education, or counseling) occurring in the vicinity of medical facilities. While employing the traditional time, place, and manner formulation for assessing the validity of the restrictions, this Court rejected the argument that, by limiting the application of the law to the public forum areas bordering medical facilities, the state was engaged in *de facto* content and viewpoint-discrimination against anti-abortion

speakers. The Court also for the first time approved a restriction on speech activity where it was protected speech itself, not the concomitant unprotected conduct or results, which constituted the justification of the law and the gravamen of the offense.

In the 13 years since *Hill* was decided, this Court has not reviewed any case involving free speech rights in the context of anti-abortion speech. Unfortunately, during that time *Madsen* and *Hill*, each of which was a troubling departure from this Court's earlier First Amendment jurisprudence, together have spawned a new creature, a hybrid of law and injunction that might aptly be dubbed an *injordinance*.

The injordinance is technically a law, in that it is enacted by a legislative body and is enforceable via criminal sanctions against the public at large, with certain legislatively-specified exceptions. However, it also resembles an injunction, in that its application is pinpointed to a particular site or sites and its expansive restrictions on speech are initially justified by the unlawful conduct of individuals at these particular sites. Moreover, as with an injunction, the injordinance's restrictions are only activated at the request of private parties, who in some instances are also granted the power to enforce them via civil action.

Massachusetts General Law Chapter 266, Section 120E ½ (the "Act") is the first example of an injordinance to come before this court. The net effect of the Act's provisions is that any abortion provider, but only abortion providers, can obtain a sweeping injunction, enforceable against any anti-

abortion speaker, simply by asking city employees to paint lines around its place of business.

This Court need not overrule *Madsen* and *Hill* to find the Act unconstitutional. However, amici urge this Court to grant the petition for certiorari and take this opportunity to review, reconsider, clarify and/or narrow its decisions in *Madsen* and *Hill* in light of their role in making laws like the Act -- variations of which are appearing all over the country -- even thinkable.

ARGUMENT

I. *MADSEN* AND *HILL* SET THE STAGE FOR THE ACT.

A. *Madsen* and Governmental Interests.

In *Madsen v. Women's Health Center*, this Court upheld portions of an injunction prohibiting First Amendment activity within 36 feet of the entrances to an abortion clinic. The Court found that the injunction was content-neutral: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." *Id.* at 762-63. Nonetheless, this Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Id.* at 764. For that reason, the Court held that injunctive restrictions on speech should be tested under a "somewhat more stringent" standard, namely, whether the restrictions "burden no more speech than necessary to serve a

significant governmental interest." *Id.* at 765. Applying that standard to the various provisions at issue, the Court found that the 36-foot zone around driveway entrances was constitutional.

In formulating the standard as it did, this Court took the first step in blurring the distinction between generally applicable laws and injunctions. This Court first correctly described the operation of an injunction:

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group . . . because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation . . .

Id. at 762. Despite this definition, this Court decided that the measuring stick for the constitutionality of injunctive restrictions on speech should be *governmental* interests, and particularly those governmental interests that coincide with the interests of the abortion provider plaintiff.

No governmental entity had asserted any interest in the outcome of the litigation between the abortion provider and the defendants in *Madsen*. While a governmental entity *might* assert an interest in protecting a woman's freedom to seek medical services, ensuring public safety and order, and promoting the free flow of pedestrian and

vehicular traffic (*id.* at 767-68), it might also assert an interest in ensuring that women are informed of all options before choosing to have an abortion, protecting the free speech rights of citizens on public sidewalks, and preserving the function of unfettered speech as a safety valve for the heated emotions certain topics generate. Those interests, too, are significant governmental interests. Yet the injunctive restrictions were never measured against those latter interests. Rather, the only governmental interests invoked by this Court, and passed down as precedent for lower courts to rely on, were those that favored the abortion provider plaintiff's efforts to restrict anti-abortion speakers.

The logical result of this Court's reliance on "governmental interests" in upholding injunctions was for courts to become less scrupulous about whether a plaintiff clinic had actually proved the elements of any particular cause of action. If a "combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction," *Madsen*, 512 U.S. at 768, there was no sense in requiring a plaintiff to prove trespass or some other direct but otherwise irrelevant violation of its own rights.

Moreover, trial courts would be understandably confused about why injunctions purportedly serving broad governmental interests should apply only to named parties and those acting in concert with them. This Court contributed to that confusion by making pronouncements such as "the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and "the only way to ensure

access was to move *all* protesters away from the doorways." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380, 381 (1997)(original emphasis). This Court did not appear to be making any distinctions between enjoined parties and third parties, and consequently, neither did many lower courts and law enforcement personnel called on by abortion clinic plaintiffs to enforce injunctions. *See, e.g., People v. Conrad*, 55 Cal.App.4th 896, 902 (1997) (reversing conviction for violation of injunction based on anti-abortion defendants' "mutuality of purpose" with enjoined parties); *Planned Parenthood v. Garibaldi*, 197 Cal.App.4th 345, 352 (2003) (reversing judgment upholding application of speech restrictive injunction against "all persons with notice").

This Court also failed to explain the role the defendants' prior bad conduct played in applying its new test. After suggesting in *Madsen* that failure to obey a prior injunction was key to a finding that a broader restriction "burdened no more speech than necessary," 512 U.S. at 763, the Court disavowed that factor in *Schenck*. 519 U.S. at 382-83.

This Court's attempt to fit injunctive restrictions on speech into the "governmental interest" mold of generally applicable time, place, and manner restrictions has led to confusion and error in other lower court decisions, including the First Circuit's decisions below.

B. *Hill* and the Interest in "Avoiding Unwanted Communication."

Although this Court in *Madsen* approved of a 36-foot speech-free zone on the public right-of-way, it struck down a provision prohibiting uninvited

approaches of patients, stating unequivocally, "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and ensure access to the clinic." 512 U.S. at 774.

Six years later, in *Hill*, this Court embraced the concept it so clearly rejected in *Madsen*. Ruling on a facial challenge, this Court upheld a Colorado statute prohibiting unconsented approaches within 8 feet of anyone within 100 feet of the entrance to a medical facility, when that approach was made for the purpose of displaying a sign, handing a leaflet, or engaging in oral protest, education, or counseling. 530 U.S. at 707, 735.

In identifying the governmental interests undergirding the law, this Court began with the general police power to protect the health and safety of their citizens, which "may justify a special focus on impeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715 (citing *Madsen*). The Court also cited the government's self-referential interest in even-handed application of the law.

Pronouncing these interests "unquestionably legitimate," the Court went on to find other interests underlying the law, ones that Colorado itself had not asserted: the interest "in avoiding unwanted communications" and the "'right to be free' from persistent 'importunity, following, and dogging' *after an offer to communicate has been declined*." *Id.* at 717, 718 (emphasis added).

This Court repeatedly stated that the statute dealt only with protecting "unwilling" listeners

from "unwanted" communication after an offer to communicate has been declined. *Id.* at 708, 714, 716, 718, 721, 723, and 727.[2] However, this reading was at odds with the plain language of the statute, which prohibited all uninvited approaches ("unless such other person consents").

This Court's conflating of uninvited approaches with rejected approaches led the court below (and the Third Circuit[3]) to the logical conclusion that, at least in the context of speech activity outside medical facilities, all approaches are as a matter of law unwanted and intimidating, and the government has an "unquestionably legitimate" interest in prohibiting such approaches.

Well, not *all* approaches. According to this Court's reasoning and holding, the state's interest extended only to prohibiting those approaches made for the purpose of engaging in otherwise constitutionally protected speech activity. As this Court noted, approaches for the purpose of "social or random conversation" were not prohibited. Neither were approaches for the purpose of panhandling, soliciting magazine subscriptions, or raving like a lunatic. Unconsented approaches without any form of oral communication were also unaffected by the statute: one could approach

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[2] Indeed, this Court implied that the statute was only triggered when the person approached took some affirmative action such as declining the offer. 530 U.S. at 734 (emphasis added) ("This statute simply **empowers** private citizens entering a health care facility with **the ability to prevent** a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear").

[3] See *Brown v. Pittsburgh*, 586 F.3d 263 (3rd Cir. 2009), discussed *infra* at 23.

without consent for the purpose of glaring, making an obscene gesture, or fingering the knife at one's side, all without violating the statute.

In sum, a police officer who witnessed an unconsented approach need simply ascertain one point: was the approach made for the purpose of engaging in core First Amendment speech activity? If so, the statute was violated. If not, there was no violation.

Despite this Court's protestations (citing *Madsen*) that the Colorado law was merely a content- and viewpoint-neutral "regulation of the places where some speech may occur," the restriction was more than that. It was not "justified without reference to content of the regulated speech." Rather, as Colorado itself had candidly admitted, speech "against certain medical procedures" [4] is an evil that government may legislate against. This Court's entire line of reasoning in *Hill* concerning the government's interest in preventing "unwanted communications" validated that viewpoint-based purpose.

II. THE ACT COMBINES THE ERRORS OF *HILL* AND *MADSEN*.

The salient unconstitutional features of the Act are: 1) singling out abortion clinics for insulation from free speech; 2) exempting pro-abortion speakers from the restrictions, and 3) imposing overbroad restrictions on speech activity.

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[4] Colorado Rev. Statutes §18-9-122(1).

The First Circuit found support for each of these features in *Madsen*, *Hill*, or both.

A. Restriction on Speech Occurring Only at Abortion Clinics is Presumptively Content- and Viewpoint-Based.

The First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its rejection of the analogous argument in *McGuire v. Reilly*, 260 F.3d 36, 44–47 (2001), challenging an earlier version of the Act. *See* Appendix to Petition for Certiorari ("Pet. App.") at 105a. Citing *Madsen* and *Hill*, the First Circuit held in *McGuire I* that the Act's purpose was content-neutral, though it had the "incidental effect" of curbing speech by "some speakers and not others." Continuing to cite *Madsen* and *Hill*, the First Circuit held that the allegedly "content-neutral" purpose was the government's need to "combat" or "curb" the "deleterious secondary effects of anti-abortion protests." These "secondary effects" were established by evidence in legislative hearings that "abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44 - 46.

In non-abortion-related cases, this Court has explicitly disapproved both prongs of this reasoning. First, the "secondary effects" doctrine has been employed by this Court and most of the Circuits exclusively in the context of sexually oriented businesses. *See Renton v. Playtime*

Theatres, Inc., 475 U.S. 41 (1986).[5] "[L]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (striking down restriction on picketing in front of foreign embassies). "The emotive impact of speech on its audience is not a 'secondary effect.' " *Id.* at 321. Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, this Court has rejected the attempt to justify speech restrictions based on generalizations about subject matter:

> "Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an

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[5] Justice Kennedy has acknowledged that the "secondary effects" test, allowing restrictions on sexually oriented businesses, is "something of a fiction," although a tolerable one in the context of zoning restrictions which have a "built-in legitimate rationale." *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448–49 (2002) (plurality) (Kennedy, J., concurring). Apparently the First Circuit believes that what it terms this Court's "well-settled abortion clinic/buffer zone jurisprudence" (Pet. App. 12a) endorses lumping anti-abortion speech in with pornography and lap dancing.

> individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis."

Police Department of Chicago v. Mosley, 408 U.S. 92, 100–101 (1972) (emphasis added). Indeed, it would be a soft foundation for free speech and equal protection that would permit the government to restrict speech activity on a hotly debated issue, and, worse, of one side of that issue, based on wholesale stereotyping of that side.[6]

A restriction may be content neutral if it is "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*). As is

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[6] Video evidence of the stereotypical confrontational anti-abortion protest is strangely absent from court records. On the contrary, *see, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 642 (3rd Cir. 2009) (video evidence "paint[s] a picture . . . very different from most other abortion clinic protest cases. . . . The [city] defendants have admitted allegations in plaintiffs' complaint as to the absence of physical confrontations of the sort **that frequently accompany anti-abortion proselytizing**") (emphasis added); *Madsen v. Women's Health Center*, 512 U.S 753, 785-90 (1994) (Scalia, J., conc. and diss.) (describing in detail contents of video depicting peaceful demonstration activity; "anyone seriously interested in what this case was about must view this tape").

clear from the First Circuit's decision in *McGuire I*, relied on in the instant case, the putatively "content neutral" justification for the statute is the alleged upsetting and disruptive nature of anti-abortion protests. There is nothing content or viewpoint neutral about a restriction on speech directed at particular locations defined by the activity that occurs there, and justified by means of a "broad classification" as to the level of disruptiveness caused by those who protest such activities. Such an ordinance is as blatantly content-based as if the Ordinance said on its face that it is intended to curb anti-abortion speech, whether it applies to other speakers or not.

The First Circuit said that it was "required" to find that the legislative purpose for the pinpoint focus of the Act was to "mak[e] every effort to restrict as little speech as possible *while combating the deleterious secondary effects of anti-abortion protests*," and that therefore the Act was content-neutral. *McGuire I*, 260 F.3d at 44 (emphasis added). These are contradictory holdings. Restricting "as little speech as possible" of the general population simply enabled the legislature to restrict far more speech of an unpopular minority than would be politically tolerable if the law were more broadly imposed.[7]

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[7] See *Railway Express v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

B. The Exemption for Clinic Employees and Agents Renders the Statute Content- and Viewpoint-Based.

As with the argument about the Act's focus on abortion clinics, the First Circuit also rejected Petitioners' challenge to the Act's exemption for clinic agents by citing its treatment of the analogous argument in *McGuire I*. Pet.App. 105a (citing *McGuire I*, 260 F.3d at 45–47). Applying the laxest standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonitions that, like viewpoint-based restrictions, speaker-based restrictions in a public forum are constitutionally impermissible. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another") (emphasis added). *See also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Instead, relying on *Hill*, the First Circuit ruled that the legislature "rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." Indeed, that conclusion does

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> Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

rationally follow; it follows from the premise that only anti-abortion speech is unwanted speech, as this Court taught in *Hill*. After all, one would hardly expect clinic employees to engage in anti-abortion speech, the "evil" targeted by the Act.

As Petitioners correctly note, the Attorney General's interpretation that clinic employees are not exempt if they engage in "partisan" speech, and the First Circuit's endorsement of that interpretation, is without any legal effect. Petition for Certiorari at 20, n.5. However, even if the Attorney General's interpretation were amended to eliminate the blatantly content-based restriction on speech "about abortion," and even if it were incorporated into the statute, such a provision would put the police in the position of evaluating the content of speech and determining which such speech is "partisan." The Ninth Circuit has held that it is unconstitutional to exempt clinic escorts engaging in speech "facilitating access" to an abortion clinic (such as "May I help you into the clinic?") from a law regulating speech activity in the vicinity of abortion clinics. *Hoye v. Oakland*, 653 F.3d 835, 852 (9th Cir. 2011). Under the First Circuit's decisions, however, a clinic escort or employee telling a patient not to listen to the pro-lifers is not engaging in "partisan" speech and is legitimately exempt from the Act's restrictions. *McGuire v. Reilly*, 386 F.3d 45, 52, 64-65 (1st Cir. 2004).

When an escort or clinic employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," the First Circuit holds that such speech is neutral and non-partisan. The peaceful

pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently. So does the Ninth Circuit.

The Attorney General's interpretation also echoes the inversion of First Amendment values first sanctioned by this Court in *Hill*, where core First Amendment speech on matters of public interest is forbidden under the exact same conditions that "incidental" or "everyday" speech is permitted. *Cf. Hoye*, 663 F.3d at 851, n. 13 ("even if the distinction between purposive and incidental speech could coherently be made, we have said that privileging the latter over the former 'turns the First Amendment on its head.' *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998)").

This Court's First Amendment jurisprudence has never recognized the concept of a justifiable or acceptable amount of content and viewpoint discrimination. Content and viewpoint discrimination are not subject to a balancing test wherein a court need only "envision at least one legitimate reason" (*McGuire I*, *supra*, 260 F.3d at 48) for creating the distinction to render it constitutional. Rather, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen v. Women's Health Center*, 512 U.S. 753, 794 (Scalia, J., concurring in part and dissenting in part). For that reason, the only "legitimate reason" for a content-based distinction is a compelling state interest, which has never been asserted in this

case. A viewpoint-based distinction is simply impermissible.

The Court should grant the petition to prevent further erosion of the First Amendment's most fundamental guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

C. The Act's Speech-Free Zone Is Grossly Overbroad for Serving Any Legitimate Governmental Interest.

In upholding the Act, the First Circuit noted that the 35-foot fixed buffer zone was slightly smaller than the zone upheld in *Madsen* "under a standard stricter than that which is applicable here." *McCullen v. Coakley* (*McCullen I*) (Pet. App. 111a). The court's *a fortiori* conclusion neglected to note that that zone in *Madsen* would be enforced only against persons who had been found to have interfered with clinic access in the past.

This Court gave no guidance in *Madsen* or *Schenck* as to how much weight to give the defendants' past unlawful behavior when applying the test for whether an injunctive restriction "burdens no more speech than necessary to serve significant governmental interests." This Court did say that this test was "somewhat more stringent" than the "narrowly tailored" standard. So the test for injunctive restrictions on speech is more stringent, but it also is applied only when the enjoined persons have "violated or imminently will violate, some provision of statutory or common law." *Madsen*, 512 U.S. at 765, n.3.

Lower courts are thus put in the position of comparing apples and oranges: speech restrictions

against those who have violated the law are evaluated under a "more stringent" standard while speech restrictions against even the most law-abiding speakers are evaluated under a less stringent standard. It is not surprising that lower courts, including the First Circuit, faced with this contradiction would latch onto this Court's suggestion in *Hill* that anti-abortion speech as a class is "unwanted." This presumption of unwantedness would justify finding unprecedented restrictions on speech on public sidewalks to be "narrowly tailored" to serve the governmental interests in assisting people to avoid "unwanted" speech.

A second problem with the First Circuit's *a fortiori* reasoning from *Madsen* is that the trial court in *Madsen* fashioned the buffer zone to deal with the "narrow confines" around the plaintiff clinic. *Madsen*, 512 U.S. at 769. Once again, the mismatch between the standards for injunctions and for generally applicable laws is manifest: while a trial court can fashion a buffer zone around a particular site with great precision to make it "burden no more speech than necessary," a statute or ordinance will – at least in theory – apply to many sites with various geographical configurations. Everyday experience tells us that 35-foot buffer zones around entrances and driveways are going to have widely different effects at different locations.

The incompatibility between narrow tailoring and statutory speech-free zones is seen most strikingly in the First Circuit's treatment of the Petitioners' as-applied challenge. The First

Circuit collapsed the narrow tailoring inquiry into the ample alternatives inquiry, following, it asserted, this Court's analytical method in *Hill*. Pet. App. 22a. At two of the three locations at issue, patients never walk on the public sidewalk but instead drive into private parking lots behind the clinics. Therefore, the First Circuit held, the law was narrowly tailored because the demonstrators never had the opportunity to engage in person-to-person communication anyway. Pet. App. 24a-25a.

However, if one considers narrow tailoring properly as a separate element, it defies common sense to hold that pushing speakers 35 feet away from driveway entrances is "narrowly tailored" to ensure access. Cars don't drive on sidewalks. If no one is standing in the driveway or roadway, a car can drive into a clinic parking lot without any impediment at all. A person standing on the sidewalk three feet from the driveway entrance will not interfere with the car's access. [8]

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[8] On the other hand, if the interest served by the zones is to allow patients to avoid (i.e., be insulated from) unwanted (i.e., anti-abortion) communications, and if there is no separate narrow tailoring prong, then the choice of distance is completely arbitrary. In applying its combined narrow tailoring/ample alternative inquiry in *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) (*McCullen I*), the First Circuit stated:

> "[T]he 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals

But what if someone ***is*** standing in the roadway blocking the street? Or what if some anti-abortion person standing on the sidewalk is throwing literature at patients by tying it to rocks and hurling the rocks at their passing cars? Wouldn't a 35-foot zone be narrowly tailored to serve the governmental interests there?

Unfortunately, in *Hill*, *Schenck*, and *Madsen* this Court endorsed the use of "bright line prophylactic rules" for dealing with anti-abortion demonstrations, although, on other topics, "[b]road prophylactic rules in the are of free speech are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). This Court set a pattern of unquestioning deference to the findings (or presumed findings) of legislatures and trials court, based on the representations of abortion providers, that various factors make the obvious and less speech-restrictive solution, i.e., enforcement of existing laws or injunctions, impracticable. Thus, narrow tailoring ends up being measured against the conduct of some "worst case protester" who (they say) cannot be restrained any other way.

> entering, departing, or within the buffer zone. Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

McCullen I, Pet.App. 111a. The same could be said of a 35-yard zone or a 3-mile zone.

That is, if it is measured at all. The Third Circuit, evaluating a 15-foot buffer zone around clinics (with an exception for clinic personnel), adopted the First Circuit's "secondary effects" reasoning and decided that it was not necessary for the legislature to prove any record of bad conduct before deciding to keep anti-abortion protesters at a distance from clinic entrances. *Brown v. Pittsburgh*, 586 F. 3d 263, 279 n. 17 (3rd Cir. 2009) ("in secondary effects cases such as this, . . . legislatures may look outside of their own regional jurisdiction for evidence substantiating the problem to which a given regulation is addressed"). Having absolved the Pittsburgh city council from the need to establish that a problem existed, the Third Circuit then employed the same argument as did the First Circuit in *McCullen*: because a larger zone was constitutional under the more exacting standard of *Madsen*, "the smaller zone established by the Ordinance is *a fortiori* constitutionally valid." *Id.* at 276. *See also Clift v. City of Burlington*, 2013 U.S. Dist. LEXIS 21888 at *6, *63 (February 19, 2013) (citing *Madsen* and *Hill* and finding 35-foot buffer zone around abortion clinic entrances and driveways to be narrowly tailored, despite the fact that zone at issue extends over a 228-foot stretch of public sidewalk).

Such an approach is the antithesis of narrow tailoring.

III. CIVIL CAUSES OF ACTION: THE INJORDINANCE COMES FULL CIRCLE.

Section (f) of the Act establishes a private cause of action for equitable relief by any abortion provider whose right to provide services has been violated or interfered with by a violation of the Act. Presumably the equitable relief would take the form of an injunction in the same (or broader) terms as the Act. Such an injunction would place in the abortion provider's hands the ability to selectively and discriminatorily enforce violations of the Act through a contempt action.

A proposed San Francisco ordinance, currently co-sponsored by nine members of the eleven-member Board of Supervisors, takes the private remedy concept a step further. Like the Act, this proposed law allows for the establishment of 25-foot buffer zones on public streets and sidewalks around the entrances and driveways of reproductive health care facilities at the request of the facility. The act makes it unlawful to "enter or remain" in these buffer zones. Four categories of persons (the same categories found in the Act) are exempt, as long as they do not engage in "demonstration activity."[9] Appendix at 6A – 9A.

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[9] The exemption for persons passing through the zone has an interesting twist. If an individual passes through the zone five or more times in an hour, that is prima facie evidence of a violation. The individual can rebut the presumption by "presenting evidence that he or she has a legitimate personal or business, non demonstration activity purpose for passing through the zone." Appendix at 8-A – 9-A. Recall that this law is being proposed in the United States of America.

Section 4304(b) of the proposed ordinance creates a civil cause of action in favor of a reproductive health care facility against any person who violates the ordinance. Appendix at 10-A. A person found to have violated the ordinance in such action "shall be liable to the aggrieved [facility] for special and general damages, but in no case less than $1000 plus attorney's fees and costs of the action."

When this proposed ordinance passes – and if the First Circuit's decision is allowed to stand -- the city could decline to prosecute anyone, leaving it to abortion providers to pick and choose whom to sue. Clinic escorts could encourage women to obtain abortion services and clinic supporters could hold rallies in front of the clinic, without being sued. But anti-abortion speakers would be on notice that any incursion into the zone would be met with a lawsuit that will cost them thousands of dollars.

In sum, this ordinance, which would be evaluated under the less stringent standard for "generally applicable" laws, would create a process by which an abortion provider could be granted, over the counter at city hall, a speech-restrictive injunction that it could discriminatorily enforce against any anti-abortion speaker.

CONCLUSION

Amici respectfully request the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted this 25th day of April 2013,

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APPENDIX

APPENDIX

FILE NO. 130262 ORDINANCE NO.

[Police Code - Access to Reproductive Health Care Facilities]

Ordinance amending the Police Code, Article 43, Sections 4301, 4302, 4303, and 4304, to replace the existing eight-foot bubble zone around individuals entering, exiting, and seeking services at health care facilities with a fixed buffer zone around the entrances, exits, and driveways of reproductive health care facilities; and to prohibit any person from entering or remaining in that buffer zone, with certain exceptions; and making environmental findings.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Planning Department has determined that the actions contemplated in this ordinance comply with the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.). Said determination is on file with the Clerk of the Board of Supervisors in File No. _____ and is incorporated herein by reference.

Section 2. The Police Code is hereby amended by amending the title of Article 43 and Sections 4301, 4302, 4303, and 4304, to read as follows:

ARTICLE 43: ACCESS TO REPRODUCTIVE HEALTH CARE FACILITIES

SEC. 4301. FINDINGS

Every person in the City and County of San Francisco ("City") has a fundamental right to privacy protected not only by the United States Constitution, but also explicitly guaranteed in Article I,Section 1 of the California Constitution. This right to privacy includes the right to access all legal health care services, including reproductive health care services.

Maintaining access to reproductive health care services is a matter of critical importance not only to individuals, but also to the health, safety, and welfare of all residents of the City. Efforts to harass, obstruct, or otherwise interfere with individuals seeking reproductive health care services may deter, delay, and even prevent individuals from obtaining necessary reproductive health care services. These efforts, which often include forcing patients to run a gauntlet of demonstrators near the entrances, exits, and driveways of reproductive health care facilities, or to confront intimidating demonstrators stationed at or near those entrances, exits, and driveways, also disrupt the ability of staff at reproductive health care facilities to devote their full efforts to providing health care services and divert valuable facility resources away from patients. Actions that result in such obstruction, delay, and deterrence of patients, and diversion of reproductive health care facilities' staff and resources, undermine the City's interest in maintaining the public health, safety,

and welfare, and in preserving its residents' constitutional right to privacy.

Standing on equal footing with the right to access health care services, including reproductive health care services, are the free speech and assembly rights of those who would gather and raise their voices on matters of public concern. Under this Article, the Board of Supervisors previously attempted to balance these rights by prohibiting harassment, within 100 feet of an exterior wall of a health care facility, of individuals entering, exiting, or seeking services at a health care facility, with harassment defined as "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." That prohibition has proven ineffective. Due to the density and space constraints of the City's urban landscape, that prohibition has not adequately prevented harassment, delay, and deterrence of patients seeking vital health care services, and in particular reproductive health care services, nor adequately prevented distraction and diversion of health care providers from their core mission of providing services in a safe and supportive environment.

The Board of Supervisors hereby finds that the creation of a buffer zone, as defined in Police Code Section 4302 as amended by Ordinance No. _____, and a prohibition on entering or remaining in that buffer zone as specified in Police Code Section 4303 as amended by Ordinance No.

_____, with certain exceptions, is necessary to promote the full exercise of the right to privacy by patients seeking vital reproductive health care services and is also necessary to maintain public health, safety, and welfare within the City. The Board of Supervisors further finds that this Article strikes a lawful and appropriate accommodation between the right to privacy and to access reproductive health care services and the needs of public health, safety, and welfare, on the one hand, and the rights of free speech and association, on the other.

Article 43, as amended by Ordinance No. _____, applies only to reproductive health care facilities, no health care facilities generally. In addition, Article 43, as amended by Ordinance No. _____, does not apply to licensed hospitals or to reproductive health care facilities owned or operated by licensed hospitals. This scope ensures the Article is narrowly tailored to address the significant governmental interests it serves, and leaves other health care facilities and locations available for speech. Individuals attempting to access reproductive health care facilities to obtain reproductive health care services have been subjected to harassing or intimidating activity from extremely close proximity, tending to hamper, delay or deter their access to those facilities and services and thus subverting their legal rights to seek and obtain legal health care services. The Board finds that reproductive health care facilities that are not part of a licensed hospital, and not owned or operated by a licensed hospital, are more vulnerable to such subversion of their patients'

rights on account of the layout and design of their facilities and parking areas as well as their staff resources and deployment. Further, reproductive health care facilities not affiliated with hospitals commonly possess fewer resources for providing adequate security and safety to individuals seeking access to reproductive health care services. Thus, Article 43, as amended by Ordinance No. _____, imposes narrowly tailored, content-neutral restrictions where they are most necessary to further the significant government interests the Article serves.

The Board finds that the modest scope of the buffer zone is sufficient to ensure that patients may gain safe and unimpeded access to reproductive health care services, while allowing speakers to effectively communicate their messages to their intended audience.

The Board further finds that obstructions and demonstrations around the entrances, exits and driveways of reproductive health care facilities can impede pedestrian and vehicle traffic and create safety hazards on the sidewalks and roadways, and that this buffer zone will help promote safe and effective pedestrian and vehicle traffic flow around reproductive health care facilities. In addition, the buffer zone will reduce disputes and confrontations requiring law enforcement services, and will protect property rights.

The Board further finds that harassing and intimidating activities conducted around the entrances, exits and driveways of reproductive health care facilities can adversely affect the

physical and emotional health and well-being of patients seeking services at a reproductive health care facility. The Board finds that this buffer zone will provide a protective space for patients and thereby help avoid those adverse health consequences.

The Board finds that this Article imposes content-neutral time, place, and manner restrictions on speech and association, which are narrowly tailored to serve significant government interests and leave ample alternative channels of communication.

This Article is not intended to create any limited, designated or general public fora. Rather it is intended to protect those who seek access to reproductive health care from conduct that violates their rights.

SEC. 4302. DEFINITIONS.

For purposes of this Article:

"Buffer zone" refers to the area encompassed by both of the following:

(1) the area on a public way or sidewalk encompassed by a radius of 25 feet from any portion of an entrance, exit, or driveway of a reproductive health care facility; and

(2) the area encompassed by extending the outside boundaries of any entrance, exit, or driveway of a health care facility in straight lines to the point where those lines intersect the sideline of the street or the property line of the reproductive health care facility.

"Demonstration activity" refers to any activity involving expressive or symbolic content,

including but not limited to the following: protesting; demonstrating; picketing; displaying or distributing pictures, literature, or other materials; and engaging in education or counseling activities.

"Person" refers to any individual, firm, partnership, joint venture, company, corporation, association, social club, fraternal organization, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit except the United States of America, the State of California, and any political subdivision of either.

"Reproductive health care facility" refers to a clinic licensed under Chapter 1 (commencing with Section 1200) of Division 2 of the Health and Safety Code, or any other facility or business that provides reproductive health care services, exclusively or in addition to other health care services. Reproductive health care facility does not include a licensed hospital or a clinic or other facility owned or operated by a licensed hospital.

"Reproductive health care services" refers to all medical, surgical, counseling, referral, and informational services related to the human reproductive system.

SEC. 4303. ENTERING OR REMAINING IN BUFFER ZONE AT REPRODUCTIVE HEALTH CARE FACILITIES PROHIBITED; EXEMPTIONS.

(a) Prohibition. Except as specified in Section 4303(b), it shall be unlawful for any person to enter or remain within a buffer zone

(b) Exemptions. Section 4303(a) shall not apply to the following:

(1) Individuals entering or exiting the reproductive health care facility. This exemption allows individuals to enter and pass through the buffer zone only while entering or exiting the reproductive health care facility, and does not permit those individuals to stop or remain in the buffer zone for any purpose, including but not limited to demonstration activity, or to engage in demonstration activity while entering or exiting the reproductive health care facility.

(2) Employees, agents, or volunteers of the reproductive health care facility, acting within the scope of their employment, agency, or volunteer service. This exemption does not allow these employees, agents or volunteers to engage in demonstration activity within the buffer zone, even if that demonstration activity is within the scope of their employment, agency, or volunteer service.

(3) Law enforcement, emergency medical, firefighting, construction, and utilities personnel and federal, state, and municipal employees, acting within the scope of their employment. This exemption does not allow these individuals to engage in demonstration activity within the buffer zone.

(4) Individuals passing temporarily through the buffer zone to reach a destination within or on the other side of the buffer zone. This exemption applies to individuals who enter or pass through the buffer zone, without stopping, either to enter a residence or a business within the buffer zone other than the reproductive health care facility or to

reach a destination on the other side of the buffer zone. This exemption does not allow these individuals to engage in demonstration activity while within or passing through the buffer zone. If an individual not subject to the exemptions in subsection (b)(1), (2), or (3) passes through the buffer zone five or more times in an hour, such activity will constitute prima facie evidence that the individual has violated Section 4303(a). The individual may rebut that presumption by presenting evidence that he or she has a legitimate personal or business, non demonstration activity purpose for passing through the buffer zone.

(c) Business Hours. Section 4303(a) applies only during a reproductive health care facility's posted business hours.

(d) Marking and Written Notice. Section 4303(a) applies only if the buffer zone is marked by the Department of Public Works ("DPW") and a notice prepared by DPW is posted conspicuously near the buffer zone. A reproductive health care facility that wants its buffer zone marked and a notice posted shall submit a written request to the Department of Public Works ("DPW"). DPW shall measure and mark the buffer zone within 14 calendar days of the request. The DPW Director or designee shall prepare signs to provide to reproductive health care facilities, upon request, for posting. The signs shall provide notice regarding the prohibitions under this Article. The DPW Director or designee may adopt rules and regulations after a public hearing to set

standards for marking and posting a notice at a buffer zone.

(e) Other Laws. Nothing in this Article shall preclude the enforcement of other state, federal, or municipal laws inside or outside of the buffer zone, including but not limited to those related to sidewalk obstruction.

SEC. 4304. ENFORCEMENT.

(a) Criminal Enforcement. Any person who violates Section 4303 of this Article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by incarceration in the County Jail, fine, or both. Upon a first conviction for violation of Section 4303, the person shall be incarcerated in the County Jail for up to three months, or fined up to $500, or both. Upon a subsequent conviction for violation of Section 4303, the person shall be incarcerated in the County Jail for up to six months, or fined up to $1000, or both.

(b) Civil Enforcement. An aggrieved person may enforce the provisions of this Article by means of a civil action. An aggrieved person includes any reproductive health care facility whose buffer zone is the site of a violation of this Article. Any person who violates any of the provisions of this Article or who aids in the violation of this Article shall be liable to the aggrieved person for special and general damages, but in no case less than $1,000 plus attorneys' fees and the costs of the action. In addition, punitive damages may be awarded in a proper case.

(c) Other Enforcement. Nothing in this Article shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

Section 3. Effective Date. This ordinance shall become effective 30 days from the date of passage.

Section 4. Scope of Ordinance. In enacting this Ordinance, the Board intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Police Code that are explicitly shown in this Ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the Ordinance.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
ERIN BERNSTEIN
Deputy City Attorney

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1168

APR 24 2013

In The
Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners.

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MOLLY WHITE, ESTHER RIPPLINGER, MARLYNDA AUGELLI, AND DR. ALVEDA KING AS *AMICAE CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICAE CURIAE*[1]

Amicae are women who attest to the importance of free speech in their abortion decisions.

Ms. Molly White had two abortions. Before her first abortion, she "asked the clinic staff about . . . the risks of abortion," but was told there was no "risk of physical complications." She said that the clinic staff, whose objective was to convince her that abortion was her best choice, "deceived" her with false information. She explains that her abortion caused continual bleeding, a damaged cervix, and uterine scarring, which led to two stillborn children and a miscarriage. She believes that "[i]f someone had been outside the clinic offering help and information, [talking face-to-face with her, she] would have decided against abortion . . . the most regrettable decision of [her] life."

Ms. Esther Ripplinger had an abortion. She asked the clinic staff about the baby's stage of development, and was told "It's only a blob of tissue." She later learned her baby actually had "hands, feet, and a beating heart." She was also told the procedure was "quick and painless" and would only cause "minor discomfort," but she later felt "shocking" and

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents accompany this brief. No counsel for a party authored this brief in whole or in part. The Judicial Education Project contributed the costs associated with the preparation and submission of this brief. Unless otherwise noted, all statements made by *amicae* are on file with counsel for *amicae curiae*.

"excruciating pain." She suffered from depression and anxiety from the "worst decision she ever made" and her "pain and incredible loss" from her abortion will "last[ ] a lifetime." She believes that "[i]f someone had given [her] information and alternatives as [she] walked into the clinic, [she] would not have made this choice." Unfortunately, her memory is only of "people with pictures of dead babies shouting," which she "perceived as not loving and caring for [her] needs."

Ms. Marlynda Augelli had an abortion. She was not given any "information on the development of the child," nor about the potential psychological side effects. She explains that her children after the abortion have "riddled [her] with guilt and remorse," since they are constant reminders that she "[threw] away" the life of her aborted child. She also cites the abortion and resulting "tremendous psychological trauma" as a factor in her divorce from her first husband. She "wish[es] that [she] could have heard a counselor on the sidewalk before [she] walked into [her] doctor's office," because "[i]f [she] had heard of the risks beforehand, [she] could have made an educated decision" and would have "never" aborted her first child.

Dr. Alveda King, niece of Dr. Martin Luther King, Jr. and a civil rights activist herself, had two abortions. She explains that her abortions led to "eating disorders, depression, nightmares, and sexual dysfunctions." Additionally, she struggles with guilt and anger, as well as an inability to bond with her other six children, who ask her why she "killed our baby."

She "wish[es] that she had received more information about abortion prior to [her] decision," because if she had seen a sonogram and known the increased risk of depression and cervical and breast cancer, "[she] never would have had an abortion."

SUMMARY OF ARGUMENT

Amicae can testify to the difficulties of being in a crisis pregnancy, including the appearance of limited options and consequent feelings of hopelessness. However, they also believe that these difficulties are exacerbated by incomplete and misleading information about the abortion procedure, fetal development, and abortion alternatives, and the *amicae* greatly regret their decisions to have an abortion. The law upheld by the Court of Appeals, MASS. GEN. LAWS ch. 266, § 120E 1/2 (2007) ("the Act"), effectively prevents other women in a similar situation from receiving this information by dramatically limiting the speech of individuals offering abortion alternatives, while leaving ample communication channels for abortion proponents. This discrimination undermines the very essence of the First Amendment by effectively silencing one side of what may be the most profound and most deeply emotional political and moral debate of our day.

This Court has held repeatedly that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will

ultimately prevail, rather than to countenance monopolization of that market. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted). Without a vibrant and functioning marketplace, society loses "the best test of truth," which is the "the power of [a] thought to get itself accepted in the competition of the market." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). By misapplying this Court's precedents, the decision below undermines the marketplace of ideas by failing to adequately scrutinize a content-based regulation of speech. It also restricts both the ability of speakers to communicate their message, and of willing listeners like *amicae* to access critical information. The decision below is the most extreme decision in a line of lower court cases that have misinterpreted this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), and is in conflict with the Ninth Circuit's decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011).

This curtailment of the First Amendment has very destructive consequences. Forced further away from their intended audience by ever-expanding buffer zones, pro-life educators and counselors, however peaceful, civil and compassionate, are becoming increasingly precluded from delivering their message: a message that would have been welcomed by audience members such as *amicae*. These buffer zone laws make off-limits to these speakers the only plot of land on earth where their message has any plausible likelihood of achieving its desired effect.

Because the reasoning of the Court of Appeals poses a grave threat to the First Amendment, this Court should intervene and set clear limits on *Hill*'s reach.

REASONS FOR GRANTING CERTIORARI

I. The Act, As-Applied, Is Viewpoint-Based Because It Exempts Clinic Agents And Employees From The Buffer Zone

In analyzing a government restriction on speech, the first question is whether that restriction is content- or viewpoint-based, subjecting the restriction to strict scrutiny, or content-neutral, triggering less exacting scrutiny. *Compare United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (applying strict scrutiny), *with Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))). *Hill v. Colorado* does not relieve the Court of performing this analysis by presuming that all buffer-zone laws are content- and viewpoint-neutral. On the contrary, *Hill*'s holding of content neutrality was conceded by the parties, and its

commentary on viewpoint discrimination was highly fact-based. The Court of Appeals improperly applied the holding to the Act as the facts of the Colorado law at issue in *Hill* are in stark contrast with those in the instant case.

In discussing the content-neutrality of the statute in *Hill* this Court was careful to limit its commentary to the specific facts of that case. The Court found significant the fact that the statute only minimally burdened the delivery of the pro-life counselors' message. The statute in *Hill* allowed for a "normal conversational distance," while allowing individuals to either remain in place and pass out literature, or come within 8 feet of clinic patients. *Hill*, 530 U.S. at 726-27 (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997)). Had the statute either imposed a significantly larger bubble, or exempted a particular viewpoint from the bubble's jurisdiction, this Court would have likely reached a different conclusion.[2]

The Court of Appeals' finding of facial neutrality can only be credited at the most superficial level.

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[2] This supposition is especially probable given the reasoning of the four-Justice concurrence: "[T]he reason for [the statute's] restriction on approaches goes to the approaches, not to the content of the speech . . . . [T]he content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence, the implausibility of any claim that an anti-abortion message, not the behavior of the protestors, is what is being singled out." *Hill*, 530 U.S. at 738 (Souter, J., concurring).

While in theory an exemption for clinic agents and employees could be neutral, in reality those exempted parties consistently favor abortion ideologically and have strong pecuniary incentives for doing so. Indeed, as the law is written, the exemption for clinic employees and agents is for speech *in the scope of their employment or agency*, which necessarily presents only a favorable perspective toward abortion. This is in stark contrast to the law upheld in *Hill*, which blocked pro-choice and pro-life speech equally. *See Hill*, 530 U.S. at 725 ("The statute is not limited to those who oppose abortion. It applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands").

Clinic representatives need not stand in front of clinics to inform pregnant women of the precise scope of their abortion rights or answer questions about the procedure itself, the safety precautions taken, or their view of its potential after-effects. Such information is readily available on the other side of the clinic's doors. But pro-life advocates know that if they are unable to deliver their message outside the clinic, prospective clients, like many of the *amicae*, will be unlikely to receive detailed information about the stage of development of their unborn babies, the details of the abortion procedure, or the risks of long-lasting emotional, psychological and even physical

harm.[4] The consequences of being prevented from communicating this type of information are immediate and irreversible; there is no second-best result and there are no second chances. *See Hill*, 530 U.S. at 792 (Kennedy, J., dissenting) ("Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur").

A viewpoint-based exemption to a neutrally-phrased law, like the exemption from the Act for clinic representatives, is equivalent to a viewpoint-based limit on speech. *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (holding a general prohibition on picketing except by those involved in a labor dispute to be viewpoint-discriminatory on its face); *see also Hoye*, 653 F.3d at 854 (rejecting facial challenge to abortion clinic buffer zone statute, while upholding

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[4] For example, according to the Planned Parenthood website, "Most women ultimately feel relief after an abortion . . . Serious, long-term emotional problems after abortion are about as uncommon as they are after giving birth." Planned Parenthood, In-Clinic Abortion Procedures, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm. Empirical research, however, raises serious doubts about the factual accuracy of such a statement. *See, e.g.*, David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006) (finding a direct correlation between a woman's history of abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health). The testimony of the *amicae* also tends to illustrate that Planned Parenthood's position is not representative of all women.

challenge as-applied, due to an unconstitutional "content-discriminatory enforcement policy" that effectively exempted clinic representatives from the law). Furthermore, the analysis for whether a speech limitation is neutral, even facially, must go deeper than the Court of Appeals' cursory analysis to address the logical effects of the law. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (The "inevitable effect of a statute on its face may render it unconstitutional" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))).

But, even if the Court of Appeals is correct that the Act is neutral on its face, it is clearly viewpoint-based as-applied, and thus should be subject to strict scrutiny. As Petitioners allege in their complaint, clinic representatives "surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." *McCullen v. Coakley*, 708 F.3d 1, 19-20 (1st Cir. 2013). Petitioners' complaint also alleges that "clinic 'employees and/or agents stand idly on the public sidewalks and streets inside the [buffer] zone' – sometimes smoking, speaking with each other or on mobile phones, or drinking coffee – 'even when clinic clients are not present.'" *Id.* at 20. Petitioners explain that the law precludes "up-close, gentle conversations, accompanied by smiles and eye contact" requiring "shorter, louder, and less personal exchanges" that are ineffective and render Petitioners "untrustworthy." *Id.* at 30. The decision below even admits

that the law "curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," *id.* at 31, and that "patients are not readily accessible to the plaintiffs [in Worcester and Springfield]," *id.* at 33. Petitioners' testimony comports with *amica* Esther Ripplinger's statement, which recounts how such restrained attempts at communication while she was contemplating an abortion would have been off-putting, whereas a normal conversation could have made a difference in her ultimate choice.

In this sense, the decision below conflicts squarely with that of the Ninth Circuit in *Hoye*, which held a buffer zone to be content-based as-applied because the City of Oakland selectively enforced its statute against pro-life counselors but not clinic representatives. *See* 653 F.3d at 851-52 ("The City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction. . . . [To do so is] necessarily to distinguish on the basis of substantive content").

The Court should grant certiorari to resolve this conflict and clarify that the Colorado statute at issue in *Hill* was treated as viewpoint- and content-neutral only because its restrictions did not significantly burden speech of any viewpoint or subject matter in front of abortion clinics.

As *Hill* explained, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 731. The Massachusetts statute upheld by the court below, by contrast, should be declared viewpoint-discriminatory both on its face and as-applied. Unlike in *Hill*, this statute does not apply to all health facilities such as hospitals. *See Hill*, 530 U.S. at 715. Moreover, the Massachusetts legislature specifically targeted only the public property surrounding abortion clinics – where sidewalk counselors have long offered information and support to pregnant women considering abortions – and created such vast no-speech zones that pro-life counselors are for all practical purposes entirely precluded from delivering their message to their intended audience.

Such an expansive speech restriction, applied only to individuals on one side of the abortion debate, is far outside the bounds of *Hill*'s viewpoint-neutrality test and should be invalidated. If, however, such a restriction is truly consistent with *Hill*, the Court should overturn that case.

II. The Decision Below Ignores The Well-Established First Amendment Right Of Women, Such As *Amicae Curiae*, To Receive Information About Abortion

In affirming the constitutionality of the Act, the Court of Appeals undermined the ability of Massachusetts women to make fully informed choices about

abortion. The decision below, unprecedented in its breadth and scope, ignores important First Amendment principles laid down by this Court concerning the right to receive information. Because the rights at stake here are crucial to the purpose of the First Amendment, and because – as the stories of the *amicae* aptly demonstrate – the consequences of their abridgement can be severe, this Court should grant certiorari and clarify this right's boundaries.

"It is now well-established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). The purpose of the First Amendment is to ensure that civil society develops a marketplace of ideas so that the truth may be found. *See Sorrell*, 131 S. Ct. at 2674 (recognizing the constitutional "importance of maintaining a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas and experiences'" in order to allow the public to "freely choose a government pledged to implement policies that reflect the people's informed will" (quoting *Red Lion,* 395 U.S. at 390)). Creating a true marketplace of ideas requires protecting the rights of both speakers and listeners.

Just as a speaker's First Amendment right entails a certain level of access to an audience, *see Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) ("[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there

must be opportunity to win their attention"), so does a listener's right include the right to receive information, *see Martin v. Struthers*, 319 U.S. 141, 143 (1943) (The First Amendment "embraces the right to distribute literature and necessarily *protects the right to receive it*") (emphasis added) (citations omitted). A law that removes a listener's reasonably unfettered ability to know what information is available renders this right practically meaningless, impermissibly burdening the listener's First Amendment rights. *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer") (citations omitted).

Nowhere is a robust supply of information more important than in difficult and crucial decisions about abortion, and *amicae* provide clear examples of the profound effects that receipt of information can have on individual choices. This Court has long recognized the importance of women making educated decisions about abortion. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences"). Women have the right to receive information about abortion from counselors with multiple perspectives on the issue, and in particular from those who have no economic interest in abortion, without interference from the state.

The strikingly broad decision of the Court of Appeals ignores the burden the Act places on the rights of women entering reproductive health centers. The Act prohibits a woman from having a conversation, receiving a leaflet, or engaging in any type of communication except with clinic employees and agents within a 35-foot fixed buffer zone in all directions. Unlike the previous version of the statute, which contained an exception for consensual communication, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2000), the current version of the statute prohibits all communication within the buffer zone, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2007). The Act applies to invited and uninvited approaches alike, regardless of how peaceful and welcomed the speech is. Even if a woman entering a clinic affirmatively chooses to communicate with one of the Petitioners, Petitioner could not enter the buffer zone to communicate with her.

By restricting consensual speech, the Massachusetts law violates the right of women to receive information about abortion. In *Hill v. Colorado*, this Court upheld a buffer zone law that contained an exception for consensual speech, and indicated that a law without such an exception would raise independent constitutional issues. In upholding that eight-foot floating buffer zone law, this Court was careful to limit its reasoning only to cases where the statute at issue strikes "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of *unwilling* listeners. . . ."

530 U.S. at 714 (emphasis added). This Court repeatedly emphasized the significance of the Colorado law's exception for consensual speech: "it is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a *willing* audience and those that protect listeners from unwanted communication." *Id.* at 715-16 (emphasis added). Despite *Hill*'s repeated admonitions, the Court of Appeals failed to consider the burden the Massachusetts statute placed on the First Amendment right of willing listeners to receive information about abortion procedures. But Massachusetts has no legitimate interest in prohibiting willing listeners from communicating with speakers inside the buffer zone.

It is no answer to say that the women approaching an abortion clinic could walk outside the 35-foot radius created by the ordinance to talk to pro-life counselors. Counselors attempting to communicate with women entering a reproductive health center are effectively prevented by this law from peacefully initiating communications in a conversational tone. From 35 feet away, a conversational voice will be wholly drowned out by the loud background noise of city streets, even without the intentional attempts by clinic employees and agents to interfere with speech of pro-life counselors attested to by Petitioners. *See McCullen*, 708 F.3d at 19-20 ("plaintiffs aver that 'pro-choice advocates . . . surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life

speech and thwart Plaintiffs' efforts to distribute literature'").

If individuals like Petitioners are prohibited from attempting to approach to initiate a conversation, women like *amicae* will likely never discover that there are people willing to have a calm and rational conservation with them about the consequences of abortion. *Amica* Esther Ripplinger, for example, recalls entering a clinic for her abortion and only being confronted with "people with pictures of dead babies shouting," which she "perceived as not loving and caring for [her] needs." She maintains that "[i]f someone had given [her] information and alternatives as [she] walked into the clinic, [she] would not have made this choice" to have an abortion. Her experience illustrates the inadequacy of the alternatives available to individuals like Petitioners under the Act.

Further, there is no other source of neutral information about abortion readily available to women who visit reproductive health facilities in Massachusetts. Unlike some other states, Massachusetts reproductive health centers are not required to provide information about the consequences of abortion. *See, e.g.*, OHIO REV. CODE ANN. § 2317.56(B)-(C); 18 PA. CONS. STAT. ANN. § 3208(a)(2); GA. CODE ANN. § 31-9A-4(a)(2). Moreover, given the pecuniary interest reproductive health-care clinics have in providing abortions, it is eminently sensible to maintain a healthy skepticism of the objectivity and forthrightness of clinic personnel in advising patients about the nature of the abortion procedure and its potential

risks. *Amicae*, like many women contemplating an abortion, insist that they needed information and either did not get it from clinic personnel, or were provided with misleading information.[4] While the First Amendment does not require that states provide information about abortion to women, it does prohibit a state from preventing third parties from circulating such information. Because Massachusetts does not require the dissemination of this information and because abortion clinics themselves are not neutral sources of information, it is especially crucial that the government not impede third parties, such as Petitioners, from making this information available to women considering an abortion.

The Court should address these issues because serious consequences result when women decide to terminate their pregnancies without full information. The right to receive information about abortion should receive special attention because of "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned*

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[4] *See, e.g.*, Statement of Molly White ("I specifically asked the abortion clinic staff about fetal development and the risks of abortion. . . . I later found out that these two answers were untrue. The abortion clinic workers withheld vital information when I asked for it. . . I also needed information about abortion alternatives"); Statement of Esther Ripplinger ("I was not made aware of the many community services available for pregnant women. . . . I asked the [clinic employee] about the baby's stage of development [and was given false information]").

Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion). As Justice Kennedy observed in his dissent in *Hill,* there is "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time," 530 U.S. at 792, than the abortion protester seeking to inform a vulnerable and often distraught young woman of the true nature of, and alternatives to, the irrevocable decision she is about to make.

The stories of *amicae* demonstrate that some women experience deep regret when they choose to abort a child without knowing all the facts. Several *amicae* attest they have suffered psychologically and, in some cases, physically, as a result of abortion decisions made with incomplete, misleading, or false information.[5] The experiences of *amicae* are representative of the experiences of many women. Empirical research on the psychological effects of abortion suggests that a woman who has undergone an abortion may face a number of difficulties. There is a direct correlation between a woman's history of

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[5] *See, e.g.*, Statement of Molly White ("I suffered from a damaged cervix and uterine scarring. . . . In addition to the physical pain, I had longer-lasting emotional pain. . . . This has taken a heavy psychological and emotional toll on my life and the life of my family"); Statement of Esther Ripplinger ("I realized that my annual increased depression was the anniversary of the abortion. I also became overly protective of my young son and feared he might die"); Statement of Marlynda Augelli ("I began to grieve the death of my first little one. . . . I was riddled with guilt and remorse and there was nothing I could do to stop those feelings. . . .").

abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health. *See* David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006). A number of other studies have also found similar correlations.[6]

The stories of the *amicae* demonstrate that these consequences can, in some cases, be prevented if the state merely steps out of the way and allows the kind of rational moral discussion protected by the First Amendment to occur. Several *amicae* assert that they would not have chosen to have an abortion had they received accurate information.[7] *Amicae*'s experience confirms Petitioners' statements. For example,

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[6] *See, e.g.*, M. Gissler et al., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, 15 EUROPEAN J. PUB. HEALTH 459 (2005) (suicide); P.K. Coleman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009*, 199 BRITISH J. PSYCHIATRY 180-86 (2011) (mental health); W. Pedersen, *Childbirth, abortion and subsequent substance use in young women: a population based longitudinal study*, 102 ADDICTION 1971-78 (2007) (drug use).

[7] *See, e.g.*, Statement of Molly White ("If sidewalk counselors had been there to give me an independent source of information, I would not have made the two most regrettable decisions of my life"); Statement of Marlynda Augelli ("I did not receive . . . any information . . . about the risk of physical and psychological side effects. . . . If I had heard the risks beforehand, I could have made an educated decision and I would not have aborted my child"); Statement of Esther Ripplinger ("If someone had given me information and alternatives as I walked into the clinic, I would not have made this choice and paid this price").

Petitioner McCullen attests to persuading around 80 women to choose to continue their pregnancies, while Petitioner Zarrella recounts the same for more than 100 women. Pet. 14-15. These stories illustrate the impact free speech can have on a woman's decision-making process. Information about abortion can have a life-altering effect, and the government should not deny a woman the opportunity to receive it.

III. The Act Violates The First Amendment By Leaving Sidewalk Counselors Without An Adequate Channel To Communicate Their Messages

The decision of the Court of Appeals also puts an impermissible burden on the First Amendment rights of would-be sidewalk counselors and all individuals, including *amicae curiae* and Petitioners, who wish to speak peacefully to women visiting reproductive health clinics. Even if the Court of Appeals is correct that the Act is a time-place-manner restriction, it is a restriction that clearly fails to leave open alternative channels of communication as required by *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). In upholding the Act, the Court of Appeals assures us that Petitioners' "voices are audible" and placards are visible from 35 feet away, while reminding us that Petitioners may still pray, use sound amplifiers, "congregate in groups outside a clinic" "employ symbols," "wear evocative garments," and "don costumes." *McCullen*, 708 F.3d at 31. This excises from the First

Amendment the right to engage in rational discourse, preserving only a vulgar right to shout at distant passers-by. The *Hill* Court, on the other hand, found significant that Colorado's 8-foot buffer zone still "allows the speaker to communicate at a 'normal conversational distance.'" *Hill*, 530 U.S. at 726-27 (quoting *Schenck*, 519 U.S. at 377). Most abortion counselors are understandably not interested in shouting slogans in the vicinity of an abortion clinic; they instead aim to discuss the dangers of abortion with those contemplating the decision to have one. Some ideas cannot be shared through simplistic T-shirt slogans or shouted over bullhorns.

Likewise, the Court of Appeals' insistence that "as long as a speaker . . . [may] reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication," is problematic on at least two levels. *McCullen*, 708 F.3d at 31. First, this Court's discussion of handbilling in both *Schenck* and *Hill* suggests that there is some limited right to engage in certain forms of communication that lie "at the heart of the First Amendment," and that merely offering alternate means of communication is therefore not necessarily an adequate alternative. *Schenck*, 519 U.S. at 377; *see also Hill*, 530 U.S. at 727 ("The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients," explaining that handbillers

may still "stand[ ] near the path of oncoming pedestrians" to hand out their material instead).

This Court also suggested in *Hill* that the availability not of alternate means of speaking altogether, but of handbilling in particular, even proffering handbills to unwilling recipients, was important. Thus it noted that a speaker offering handbills could still "stand[ ] near the path of oncoming pedestrians and proffer[ ] his or her material, which the pedestrians can easily accept." 530 U.S. at 727. Under the Act, handbilling would be rendered virtually impossible because of the distance counselors are required to stand from entrances, putting them well outside the "path of oncoming pedestrians." *Id.*

The Court of Appeals' hasty dismissal of a speaker's right to use her preferred method of communication further ignores the fact that some communication methods do carry unique features, as this Court taught in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Just as a lawn sign is a "venerable means of communication that is both unique and important," *City of Ladue*, 512 U.S. at 54, so normal conversation carries a particular message of caring and personal respect that shouting or distant picketing with signs or costumes could not convey.

While on its face the Act may appear to merely forbid certain *means* of communication by banning speech by non-clinic employees or agents within a 70-foot bubble, as applied it can prevent *all* communications about abortion alternatives. For example, the

Court of Appeals acknowledged that patients at both the Worcester and Springfield clinics were "not readily accessible to the plaintiffs" due to the location of clinic entrances in relation to the buffer zone. *McCullen*, 708 F.3d at 33. The practical difficulty – and at times impossibility – of initiating conversation with women squarely conflicts with *Hill*, which underscored that "the First Amendment protects the right of every citizen to 'reach the minds of *willing* listeners and to do so there must be opportunity to win their attention.'" *Hill*, 530 U.S. at 728 (quoting *Kovacs*, 336 U.S. at 87) (emphasis added). The question, ultimately, is whether the First Amendment protects merely the right to cheer for one's own team or whether it protects the right to a fair opportunity for persuasion through the free exchange of ideas. We respectfully ask this Court to grant certiorari and reaffirm the latter protection.

Finally, by forbidding *all* non-clinic-based speech in a fixed area, the Act "burden[s] substantially more speech than is necessary to further the government's legitimate interes[t]" in promoting public health and safety. *Ward*, 491 U.S. at 799. This intrusion is not necessary to achieving their statutory goal of increasing "public safety at reproductive health care facilities." 2007 Mass. Adv. Legis. Serv. 155. In fact, by the time of the law's passage in 2007, there had been no adjudicated violation of Massachusetts' previous less restrictive buffer zone law, or even from 2000 to 2007, "prosecution during that period under any state, federal or local law directly targeting violence,

obstruction, intimidation, trespass, or harassment at abortion clinics in Massachusetts." Pet. 6.

While the *Hill* Court did state that a speech restriction "may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal," 530 U.S. at 726, it did not eliminate this tailoring requirement altogether. *Hill* explains that a time, place, or manner restriction must be "narrowly tailored to serve the government's legitimate, content-neutral interests." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798). It pointed specifically to the way that speech was still possible under the Colorado statute at issue:

> the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in *Schenck*, demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

530 U.S. at 729-30. The Court of Appeals, on the other hand, completely failed to address how a rule excluding those silently distributing leaflets, standing in place with signs, or engaging in consensual conversations, from a much larger fixed zone is remotely

related to – let alone tailored to – the asserted governmental interest in public safety.

The Court of Appeals also misread *Hill* by failing to take into consideration a crucial caveat to this Court's discussion of narrow tailoring: that the lower bar for narrow tailoring only applied to a "content-neutral regulation [that] does not entirely foreclose any means of communication." *Hill*, 530 U.S. at 726. Even if the Court of Appeals is correct that the Act is content-neutral, it clearly forecloses certain means of communication, including handbilling as discussed above, and thus is materially different from the type of regulation discussed in *Hill*.

CONCLUSION

For the foregoing reasons, *Amicae* request that this Court grant the writ of certiorari.

Respectfully submitted,

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Dated: April 24, 2013

JOINT APPENDIX

RECORDS AND BRIEFS

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No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 25, 2013
CERTIORARI GRANTED JUNE 24, 2013

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U.S. DISTRICT COURT
DISTRICT OF MASSACHUSETTS (BOSTON)

CIVIL DOCKET FOR CASE #:
1:08-cv-10066-JLT

MCCULLEN ET AL. v. COAKLEY*

01/16/2008	1	COMPLAINT against Martha Coakley, *** filed by Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Cannel Farrell, Eric Cadin.
01/16/2008	2	MOTION for Preliminary Injunction by Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Cannel Farrell, Eric Cadin.

* * *

05/06/2008	33	STIPULATION (Joint) As to the Content of the Trial Record for the Bench Trial of Plaintiffs' Facial Challenge.

* * *

05/14/2008	69	Plaintiffs' Proposed Findings of Fact and Conclusions of Law.
05/14/2008	70	Proposed Findings of Fact by Martha Coakley.

* * *

08/22/2008	74	ORDER entered. MEMORANDUM AND OPINION entered ... "for the foregoing reasons, the Act survives under all three facial challenge standards" ... "because defendant prevails

* Entries edited for brevity and clarity.

		on all counts of plaintiffs' facial challenge, plaintiffs' request for preliminary and permanent injunctive relief is DENIED."
09/16/2008	75	Plaintiffs' NOTICE OF INTERLOCUTORY APPEAL as to 74, Memorandum & Opinion.
		* * *
07/09/2009	82	USCA Judgment as to 75 Notice of Interlocutory Appeal, filed by Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith, Jean Blackburn Zarrella. *** The judgment of the district court is affirmed.
07/09/2009	83	OPINION of USCA. USCA No. 08-2310.
		* * *
09/17/2010	94	MOTION for Leave to File Amended Complaint by Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith, Jean Blackburn Zarrella.
09/17/2010	95	MOTION for Order ... To Permit Argument as to Facial Invalidity by Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith, Jean Blackburn Zarrella.
		* * *
10/07/2010	99	MOTION for Judgment on the Pleadings on the As-Applied Claims in Counts Two through Eight, by Martha Coakley.

* * *

12/29/2010 110 ORDER entered. For the reasons set forth in the accompanying memorandum, this court hereby orders that: Plaintiff's Motion for Order ... To Permit Argument as to Facial Invalidity 95 is DENIED. Defendant's Motion for Judgment on the Pleadings on the As-Applied Claims in Counts Two Through Eight 99 is ALLOWED. Plaintiff's Motion for Leave to File Amended Complaint 94 is ALLOWED IN PART and DENIED IN PART.

12/29/2010 111 MEMORANDUM AND ORDER entered. Amended Complaint due by 2/27/2011.

02/25/2011 112 AMENDED COMPLAINT against All Defendants, filed by Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith, Jean Blackburn Zarrella, Cyril Shea, Donald Golden, Nancy Clark, Mark Bashour, Noreen Beebe.

* * *

08/09/2011 128 STIPULATION as to the Content of the Trial Record for the Bench Trial of Plaintiffs' As-Applied Challenge.

* * *

08/15/2011 147 Proposed Findings of Fact by Martha Coakley ***.

* * *

10/12/2011 151 Supplemental Proposed Findings of Fact by All Defendants.

10/29/2011	152	Proposed Findings of Fact by Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith, Jean Blackburn Zarrella.
02/22/2012	153	ORDER entered. MEMORANDUM AND ORDER.
02/22/2012	154	ORDER entered. ORDER DISMISSING CASE.
03/19/2012	155	NOTICE OF APPEAL re 153 Order by Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith, Jean Blackburn Zarrella.

* * *

01/10/2013	159	OPINION of USCA as to 155 Notice of Appeal, filed by Eric Cadin, Nancy Clark, Cyril Shea, Mark Bashour, Eleanor McCullen, Gregory A. Smith, Jean Blackburn Zarrella.
01/20/2013	160	USCA Judgment as to 155 Notice of Appeal, *** The judgment of the district court is affirmed.

* * *

FIRST CIRCUIT COURT OF APPEALS
 # 08-2310

MCCULLEN, ET AL. V. COAKLEY

APPEAL FROM: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS*

10/20/2008 CIVIL CASE docketed. Notice of appeal (doc. #75) filed by Appellants Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith and Jean Blackburn Zarrella.

* * *

01/27/2009 BRIEF filed by Appellants Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith and Jean Blackburn Zarrella. Length: 60 pages, 13,993 words. Copies: 11. Certificate of service (mailed) dated 01/26/2009. Brief due 03/02/2009 for Appellee Martha Coakley.

* * *

01/27/2009 JOINT APPENDIX filed by Appellants Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith and Jean Blackburn Zarrella. Volumes: 1. Copies: 5. Certificate of service (mailed) dated 01/26/2009.

* * *

02/04/2009 PLEADING Tendered: Amicus Curiae Brief filed by Not Parties Marylynda Augelli, Susanna Brennan, Esther Ripplinger

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* Entries edited for brevity and clarity.

and Molly White. Certificate of service dated 01/30/2009.

* * *

02/24/2009 AMICUS BRIEF filed by American Civil Liberties Union of Massachusetts. Length: 14 pages. Copies: 9. Certificate of service dated 02/23/2009.

* * *

02/25/2009 BRIEF filed by Appellee Martha Coakley. Length: 51 pages, 14,000 words. Copies: 10. Certificate of service (mailed) dated 02/25/2009. Reply brief due 03/16/2009 for Appellants.

03/17/2009 SUPPLEMENTAL Record filed. No. of Volumes: 1, Comments: Doc # 79 (Transcript).

* * *

03/17/2009 REPLY BRIEF filed by Appellants Eric Cadin, Carmel Farrell, Eleanor McCullen, Gregory A. Smith and Jean Blackburn Zarrella. Length: 28 pages, 6,677 words. Copies: 10. Certificate of service (mailed) dated 03/16/2009.

* * *

03/25/2009 Case calendared: 05/05/2009 Boston, MA Panel Courtroom.

* * *

05/05/2009 Case argued. Panel: Howard Appellate Judge, Selya Appellate Judge, Hansen Appellate Judge. Arguing Person Information Updated for: Michael J. Deprimo arguing

for Appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell, and Eric Cadin; Arguing Person Information Updated for: Kenneth W. Salinger arguing for Appellee Martha Coakley.

07/08/2009 OPINION issued by Jeffrey R. Howard, Appellate Judge; Bruce M. Selya, Appellate Judge and David R. Hansen, Appellate Judge. Published.

07/08/2009 JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Bruce M. Selya, Appellate Judge and David R. Hansen, Appellate Judge. 08-2310 Affirmed.

07/22/2009 PETITION filed by Appellant Eleanor McCullen for rehearing en banc, for panel rehearing. Certificate of service dated 07/21/2009.

08/18/2009 ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Michael Boudin, Appellate Judge; David R. Hansen, Appellate Judge; Kermit V. Lipez, Appellate Judge and Jeffrey R. Howard, Appellate Judge denying petition for rehearing en banc filed by Appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell and Eric Cadin; denying petition for panel rehearing filed by Appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell and Eric Cadin.

* * *

09/03/2009	MANDATE issued.

* * *

11/19/200	U.S. SUPREME COURT NOTICE filed regarding Petition for Writ of Certiorari.
03/24/2010	U.S. SUPREME COURT ORDER entered on 03/22/2010. The petition for a writ of certiorari was denied.

* * *

FIRST CIRCUIT COURT OF APPEALS
 # 12-1334

MCCULLEN, ET AL. V. COAKLEY, ET AL.

APPEAL FROM: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS*

03/22/2012 CIVIL CASE DOCKETED. Notice of appeal filed by Appellants Mark Bashour, Noreen Beebe, Eric Cadin, Nancy Clark, Carmel Farrell, Donald Golden, Eleanor McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella.

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05/23/2012 JOINT APPENDIX filed by Appellants. Number of volumes: 1. *** Certificate of service dated 05/21/2012.

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05/22/2012 APPELLANT'S BRIEF filed by Appellants Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella. Certificate of service dated 05/22/2012. Brief due 06/25/2012 for appellees.

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07/02/2012 APPELLEE'S BRIEF filed by Appellees Martha Coakley, Daniel F. Conley, Joseph D. Early and Mark G. Mastroianni. Certificate of service dated 06/29/2012. Reply brief due 07/16/2012 for appellant Mark Bashour, Eric Cadin, Nancy Clark, Eleanor

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* Entries edited for brevity and clarity.

McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella.

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07/02/2012 CORRECTED BRIEF filed by Appellees Martha Coakley, Daniel F. Conley, Joseph D. Early and Mark G. Mastroianni replacing previously filed brief [5653786-2]. Certificate of service dated 07/02/2012.

07/03/2012 ASSENTED TO MOTION to extend time to file *reply brief* filed by Appellants Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella. Certificate of service dated 07/03/2012.

07/05/2012 ORDER granting motion to extend time to file brief and/or appendix filed by Appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Eric Cadin, Cyril Shea, Nancy Clark and Mark Bashour. Reply brief due 08/03/2012 for appellant Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella.

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08/03/2012 REPLY BRIEF filed by Appellants Mark Bashour, Eric Cadin, Nancy Clark, Eleanor McCullen, Cyril Shea, Gregory A. Smith and Jean Blackburn Zarrella. Certificate of service dated 08/03/2012.

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09/25/2012 CASE calendared: Wednesday, 11/07/2012 Boston, MA Panel Courtroom.

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11/07/2012	CASE argued. Panel: Michael Boudin, Appellate Judge; Bruce M. Selya, Appellate Judge and Norman H. Stahl, Appellate Judge. Arguing attorneys: Mark L. Rienzi for Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Eric Cadin, Cyril Shea, Nancy Clark, Mark Bashour and Carmel Farrell and William W. Porter for Martha Coakley, Daniel F. Conley, Joseph D. Early and Mark G. Mastroianni.
01/09/2013	OPINION issued by Michael Boudin, Appellate Judge; Bruce M. Selya, Appellate Judge and Norman H. Stahl, Appellate Judge. Published.
01/09/2013	JUDGMENT entered by Michael Boudin, Appellate Judge; Bruce M. Selya, Appellate Judge and Norman H. Stahl, Appellate Judge. Affirmed.
02/04/2013	MANDATE issued.
04/02/2012	U.S. SUPREME COURT ORDER entered on. The petition for a writ of certiorari was pending.
06/26/2013	U.S. SUPREME COURT ORDER entered on 06/24/2013. The petition for a writ of certiorari was granted.

EXCERPTS OF TESTIMONY OF MAUREEN PAUL SUPPORTING S.148 [DKT. NO. 66-2]

* * *

Like many of my colleagues at Planned Parenthood and across the country, my outspoken commitment to women's health makes me a target of anti-abortion intimidation and harassment. I have been singled out by name on the Massachusetts Pro-life Action hotline and often have the privacy of my home violated by anti-abortion mailings. Just this week, an anonymous letter was sent to all of my neighbors referring to me as an "abortionist" and revealing my exact address. Three weeks after the brutal murder of Dr. Barnett Slepian, my name appeared on the Nuremberg Files website—a veiled hit list against reproductive health care providers—and I have recently received an explicit death threat. It is in this climate of threats and intimidation that I go to work every day only to be confronted by protesters at the clinic entrances who surround my car, put their faces to my window, scream out my first name, call me a murderer, and videotape me. It is the same intimidation that I see in the eyes of my patients who are visibly shaken after being accosted by aggressive protesters at the clinic door.

These acts of harassment and intimidation occur against a backdrop of unprecedented violence against reproductive health care providers—a violence marked by arsons, bombings, chemical attacks, and the brutal murders of dedicated clinic workers—a violence that has claimed the lives, not of faceless strangers, but of dear friends and colleagues in Florida, New York, and right here in the Commonwealth. In this climate, even seemingly ordinary gestures by people we see every

day at the clinic *feel* threatening, whether or not they are meant to be. For little did Dr. John Britton and his volunteer escort James Barrett know as they sat in a car outside a clinic that a protester they saw every day would *this* day walk up and in the split second of a seemingly ordinary gesture end their precious lives forever. Little did Lee Ann Nichols and Shannon Lowney know when they smiled up at a seemingly ordinary man asking a seemingly ordinary question that he would riddle their warm faces with bullets. It is in the midst of this terrorizing ambiguity that my first name on the lips of a protester becomes unwelcomed intimacy, that the distinction between a violent rhetoric and a violent action begins to blur, and that those 30 seconds that I and my colleagues wait for the clinic garage door to open become one of the longest 30 seconds of our lives.

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TESTIMONY OF ALICE VERHOEVEN SUPPORTING S.148 [DKT. NO. 66-3]

My name is Alice Verhoeven. I am Vice-President and Clinic Director for Planned Parenthood/Preterm Health Services of Greater Boston. Planned Parenthood provides full reproductive health care services for all women. Our services include birth control, gynecological counseling, medical and surgical abortion, breast and cervical cancer screening, sterilization, and screening and treatment for sexually transmitted infections.

In Massachusetts, reproductive health care facilities have been the targets of countless blockades, protests, and disturbances culminating in the tragic murders of Lee Ann Nichols and Shannon Lowney on December 30, 1994 in a shooting which left five others injured. Since that time staff and patients have continued to be subject to harassment and intimidation by protesters who approach within extremely close proximity.

When patients and staff enter our facility at 1055 Commonwealth Avenue, they are confronted with protesters attempting to hand them literature and engage them in conversation. Some of protesters target patients—walking in front of them thrusting literature or graphic pictures in their face, and often videotaping them. Because our property line stops right at the entrance to the facility, these patients are harassed and pursued to the door of the clinic.

Often patients are visiting the clinic for the first time, are unsure of directions and become panicked while attempting to avoid the protesters. Quite a few of our patients speak little or no English and the situa-

tion is even more difficult for them. On countless occasions I have seen patients enter our lobby with terrified, confused looks and often burst into tears as a result of this harassment.

At the Planned Parenthood facility on Commonwealth Avenue, we have an underground garage and some patients opt to park there to avoid walking in through the protesters. Even there, they encounter protesters standing less than a foot from their car windows, sometimes standing in the driveway. For security reasons our garage door is kept closed and only opened by a security guard when a car approaches. In the 30 seconds this takes, patients and their escorts are subjected to a barrage of harassment, usually verbal and sometimes physical. A protester once pushed one of our clinic escorts against a car waiting at the garage. Luckily, that time, no one was hurt.

I have with me the written testimony of one of our patients who could not be here today. As you will read in her statement, the harassment she was subjected to as she entered our Commonwealth Avenue facility left her angry and fearful—anti-abortion protesters rushed up to her car, yelled at her, and tried to block her entrance to the clinic.

Approximately 100 patients have filed harassment incident reports about the protesters to address their frustrations, anger, and fear at having their entrance to the clinic impeded. One woman stated that the protester's actions scared her. "I thought they were going to hurt me," she said. Patients tell of how protesters stood "shoulder to shoulder", verbally abusing them. They tell of their fear as protesters yell and follow closely behind them right up to the door.

I worry about the potential for violence that is created when individuals are mercilessly harassed. On numerous occasions, I and members of my staff have had to caution the husbands, parents, and partners of patients against a physical altercation with the protesters. It is truly remarkable that there haven't been more altercations and incidents of physical violence. We can't guarantee that the buffer zone will prevent violence, but it will reduce the intense harassment now experienced by patients and staff, while providing ample opportunity for the expression of differences of opinion.

I am also concerned for the safety of those who work at our facilities. Our staff has been subjected to the same harassment as our patients. The antiabortion violence that physicians and staff have been subjected to throughout the country, and here in the Commonwealth, has a profound effect on those who provide health care.

I will submit to the Committee the written testimony of one of our nurses, who, fearful for her personal safety chose not to appear before the committee today. In her testimony, she describes one day when she was attempting to enter the garage to go to work, a protester stood between her car and the swipe card machine, making it impossible for her to open the garage door. In addition, two protesters moved behind her car so that she could not back up. While she was caught between protesters, they yelled at her, touching her car and moving very close to the car window. Needless to say, it was a frightening experience.

Another staff member reported an incident as she approached the clinic, three protesters stood across the entrance with less than one foot between them. She

was forced to squeeze between them to gain entrance to the clinic. The buffer zone legislation will help our staff access their place of employment without the barrage of harassment they now face.

The proposed buffer zone legislation is not about abortion, it is about improving public safety - it is about toning down the intensity of emotion that now exists outside reproductive health care facilities. On behalf of the staff and patients of the Planned Parenthood League of Massachusetts, I urge you to give Senate Bill 148 a favorable report. Thank you for the opportunity to speak on this very important issue.

EXCERPTS OF TESTIMONY OF KAREN CAPONI SUPPORTING S.148 [DKT. NO. 66-4]

My name is Karen Caponi. I am a nurse practitioner and I serve as the clinic director for Planned Parenthood in Worcester. At our Worcester facility, we provide full gynecological services, including abortion. We provide family planning, infertility services, treatment of sexually transmitted infections, HIV testing. We received DPH funding for women to come for referrals and exams for mammography services. I see over 2100 gynecology patients each year at Planned Parenthood and oversee the daily clinic management.

* * *

When patients and staff arrive at our facility, they are often subjected to verbal assaults from protesters on the sidewalk and in our driveway. All patients are subject to harassment, regardless of the reason that they come into the clinic. Often, the verbal harassment is inflammatory such as "murderer," "baby killer," and "you're going to hell" and one of our •f physicians has been threatened with, "I'm watching you" and "you won't be smiling for long."

Our facility has a driveway into our parking lot, which has been the site of repeated problems with protesters. The protesters walk slowly across the driveway and, in some cases, stand blocking the driveway, yelling and often approaching the driver and passenger. Our guard is often forced to ask a protester to move out of the way of a vehicle several times before the protester complies. This results in the dangerous situation of a car obstructing traffic because they cannot proceed into the parking lot.

In the past year the Worcester Police have been called several times to remove protesters from the driveway because they refused to let a patient or employee enter. In one incident, a protester hit an employee's car door with his fist while she was attempting to enter the parking lot. At least one accident has occurred and I am concerned others are inevitable.

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EXCERPTS OF TESTIMONY OF FILOMENA KATIA NATALE SUPPORTING S.148 [DKT. NO. 66-5]

My name is Filomena Katia Natale. I have been a nurse in the Boston Planned Parenthood clinic since January, 1998. I am writing in support of Senate Bill 148, because I believe it would help to end the current workplace harassment which staff members such as myself endure regularly. This harassment not only makes it emotionally difficult for us to perform our jobs to the best of our abilities, but also frequently makes it physically difficult even to enter the building.

On February 20, 1999, as I was on my way to work, several protesters blocked my entrance into the parking garage at the clinic. One protester stood between my car and the card reader so that I could not swipe my pass to open the garage door. As I opened my window to ask the escorts to help me, the protesters moved very close to my car and began screaming at me and making comments about my nationality. The protesters then prevented me from backing up out of the driveway by continuously circling my car and standing behind it. By the time I made it into the building, I was very upset. I was furious that protesters seemed to be able to freely and openly prevent me from getting to work. Following their deliberate personal comments and loud verbal harassment, it took me several minutes to regain my composure so that I could perform my medical duties compassionately and effectively.

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EXCERPTS OF TESTIMONY OF NAGIN KORMI SUPPORTING S.148 [DKT. NO. 66-6]

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One morning a woman drove up to the front of the clinic, turned her hazard lights on, and worked her way through the crowd to get inside. Her three young children were waiting in the car for their mother to return. Clearly she was not there for an abortion, and as it turned out, she had come in to pick up her supply of birth control pills. As soon as she was inside the building, a group of four protesters surrounded her car and started screaming at her children. The woman ran back outside and told them to get away from her children and her car. Still the protesters did not relent. As soon as she went back inside, they continued to badger her young children.

Horrifying doesn't begin to explain this situation. The children were scared, had locked themselves in the car and tried to drown out the sound of the protesters by turning on the radio. One of them was crying, and by the time the woman had gotten her birth control pills and returned to her car, she was in a furious rage.

On another morning, a cab pulled up to the sidewalk by the clinic, and was immediately engulfed by a large group of protesters. Inside was a woman in her mid-twenties and her elderly grandfather. The protesters wouldn't let them out of the cab and yelled at the driver to drive away. The woman and her grandfather were trapped inside the cab for several minutes, until the driver got out and started yelling at the protesters. Then two escorts were able to make their way to the woman's side as she ran crying into the clinic. Her grandfather, who walked with a cane, was unable

to run. He needed my assistance and was forced to slowly make his way through the angry crowd. In the amount of time it took him to walk from the cab to the clinic entrance, he was shoved and almost fell down twice. He was also forced to endure various insults about his race and remarks about how his handicap was a punishment from God.

* * *

EXCERPTS OF HARASSMENT INCIDENT REPORT COMPLETED BY VANESSA B. ON DECEMBER 5, 1998 BOSTON PLANNED PARENTHOOD CLINIC [DKT. NO. 66-7]

SUBMITTED IN SUPPORT OF SENATE BILL 148

Describing her experience arriving at the Boston Planned Parenthood clinic on December 5, 1998, the patient reported:

- A group of protesters approached the car as she was being dropped off.
- The protesters blocked the doorway of the clinic.
- One protester put her hands on the patient's shoulder.
- The protesters yelled at her.

The patient described her reactions:

- Scared
  "person put their hands on my right shoulder. I told that person straight out, 'First of all, don't put your hands on me.' Bad enough I was scared coming here, afraid I might get shot."
- Nervous
  "One person was carrying a fake baby doll and was yelling, 'It's alive. You see what you're doing!' Another person had a taperecorder and was playing a tape with a child crying, "Mommy, Mommy.' I got real nervous because they didn't know why I was there."
- Intimidated
  "They really need to do something about the protes-

tors, because they scare people, intimidate them. They show violent attitudes which aren't good for a lot of people."

- Angry
  "They [the protestors] made me scared, but they are not running me away [from the clinic] because I have rights too."

Original signed harrassment report attached

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EXCERPTS OF DEPOSITION TESTIMONY OF WILLIAM B. EVANS [DKT. NO. 51]

* * *

Q. Have you personally had to warn anybody?

A. I don't recall personally, not since the Buffer Zone Law legislation.

Q. Prior to this buffer zone legislation we're talking about there were numerous other laws pertaining to activity out in front of the abortion clinics?

A. Yes.

Q. There was the federal law called FACE?

A. Right.

Q. There was also a state law regarding access to clinics?

A. Right.

Q. And there are also laws prohibiting assault?

A. Sure.

Q. And laws prohibiting harassment, criminal laws—

A. Yes.

Q. —prohibiting harassment?

A. Yes.

Q. Has this law added anything at all to the arsensal of law enforcement?

MS. FACHER: Objection

MR. PORTER: Objection.

Q. You can answer.

A. I think it does keep a lot of the, I shouldn't say a lot, some of protesters out of the area of the immediate doorway. You know, I think there's clearly, it's clearly painted on the sidewalk and I think for the most part I think the protesters respect that zone.

So my answer would be I think it's helped keep out the clutter in front of the place.

* * *

Q. What is the general atmosphere that you have observed out in front of the Planned Parenthood abortion clinic since the Buffer Zone Law has been put in effect?

A. The general atmosphere?

Q. Atmosphere. Is it peaceful? Is it hectic? Is it?

A. No. It's, it's peaceful.

* * *

Q. Over the period of time since you've been involved in going to the clinic have you seen a lot of screaming?

MR. PORTER: Objection.

MS. FACHER: Objection.

Q. By either side or passersby or anybody out in front of the clinic?

A. On the second Saturday without a doubt there's a lot of screaming.

Q. And screaming by whom?

A. More by the people who are pro-abortion. They yell. They scream. They're very vulgar as opposed to the protesters. The anti-abortion people basically are saying the rosary.

Q. Are you talking about escorts or some other people when you say vulgarities?

A. It's the people, there's about a dozen people on the second Saturday of every month who show up who are pro-abortion. We put them in two separate pens. We have the anti-abortion and we have the pro-abortion. The pro-abortion are all young college age kids who they're the ones yelling the vulgarities.

Q. And these pens are next to each other?

A. Yes.

Q. Are they on the street or on the sidewalk?

A. One is on the sidewalk, one is on the street.

Q. When you say pens, is this like the metal grating type of thing?

A. Exactly.

Q. So the yelling and screaming is not at patients about to enter the clinic?

A. No.

Q. Do you often times or have you often times seen the pro-life protesters yelling and screaming in the face of people about to enter the clinic?

A. No.

Q. Have you ever seen it?

A. No. They are yelling at the people who are protesting on the other side.

Q. I misunderstood you. Who is yelling at whom?

A. The pro-abortion people are yelling at the older people who are protesting at Planned Parenthood. Their obscenities are not at the people going in the clin-

ic, it's at the people who are protesting against Planned Parenthood.

Q. So the vulgarities by the pro-abortion people are directed at the prayers?

A. Right.

* * *

Q. So what's the typical scenario if someone may recognize a patient down the street coming, what occurs at that point?

A. What occurs, Tom, is if they see a potential client, say, coming from half a block away they'll go out and try to greet them possibly at the end of the building on Comm Ave and one, an agent will get on each side of that person and walk them through to the doorway and into the premises.

Q. What do the pro-lifers do?

A. Sometimes they go right up close to the agent and they start talking and maybe they'll put out an arm with a pamphlet and they'll stay with them and sort of, you know, dog them per se until they basically now get into the buffer zone area where they back off.

Q. Do you ever hear the conversation?

A. No. No. For the most part it's, you know, they're right up close to the agent and the person.

* * *

A. That other law basically allowed them without blocking their access to actually ride them all the way right into the door. The clinic access law clearly states blocking where, to me, dogging or, you know, hanging on their shoulder is allowed with the old law. This pre-

vents them from actually riding them all the way to the minute they get inside the doorway.

* * *

Q. What do they typically say, the pro-life people?

A. Well, you know, you know, "don't abort your baby," you know, "have it," "there's people out there who want babies." You know, basically just please don't go in there, God loves you.

Q. Have you ever heard a pro-lifer swear at a person about to enter the clinic?

A. No, never.

Q. Have you ever heard a pro-life person use a racial epithet at a person about to enter the clinic?

A. No.

* * *

Q. Captain, referring to page four under 8(a), have you had discussions with the Attorney General's Office regarding Boston Police Department practices and policies on enforcement of the Buffer Zone law regarding your testimony at upcoming trial?

A. Yes.

Q. What are you going to be testifying to, if you know?

MR. PORTER: Objection.

A. I'm going to be testifying to the fact that we're down there closely watching the law and what it states and I'm going to testify that, you know, we do see violations obviously but we try not to arrest anyone. We always try to mediate and warn and should it reoccur, then we will take enforcement action.

So, you know, as far as the practices go, yes, we do watch the enforcement and the conduct down there but we don't take strict interpretation as far as enforcing it.

* * *

Q. Could you, would you base an arrest, a violation of the Buffer Zone Law based on a person looking down and you assuming that that's not consent?

MS. FACHER: Objection.

Q. Would that be enough for you?

MR. PORTER: Objection.

MS. FACHER: Objection.

A. It would if all the other requirements of the law were in place.

Q. Is it always easy to determine whether a person is looking down or looking away?

MR. PORTER: Objection.

MS. FACHER: Objection.

A. I think it's easy, that's one of the easy things to sort determine here, is consent. I think you can clearly tell when a person is irritated by the approach of the protesters.

* * *

BUFFER ZONE BILL (S. 1353) TALKING POINTS
[DKT. NO. 61-9]

History:

The current buffer zone law resulted from a compromise with former Speaker Finneran. It establishes an 18 foot buffer zone. Protesters are able to protest within the buffer zone if they remain six feet away from any entering patient or staff member (i.e. "floating bubble") and can come within six feet of any entering patient if given consent.

The problem with the current law:

Floating bubbles are problematic because the definition of consent is often subject to interpretation. In 2006, Planned Parenthood League of Massachusetts received 46 written reports of buffer zone violations. Only one case has been prosecuted in court but was later thrown out due to the statute's vagueness.

What this new bill does:

This bill will create a fixed 35-foot buffer zone around the entrances and driveways. No person may stand within 35 feet of an entryway except people entering or leaving the clinic, including patients and staff, law enforcement and other public service employees acting within the scope of their employment, or people using the public sidewalk or street right-of-way to get to another destination. There is no longer any floating bubble zone.

Why it is necessary:

This bill will help public safety officers to maintain and ensure civil order. This bill is an effective tool to make the buffer zone enforceable, reduce the social cost

of violence outside these health facilities, and reduce the need for court ordered injunctions.

Constitutionality:

As has been decided by the SJC, the buffer zone does not "violate the right of freedom of speech or the right of the people peaceably to assemble".

TIME - PLACE- MANNER (First Amendment)

The first amendment guarantees ample means to engage in public speech, but not the most effective or most desirable means. Time, place and manner restrictions require a compromise consideration of public safety concerns with ample, alternative means of communication.

The buffer zone bill is "**narrowly tailored**" to serve a significant government interest in protecting and promoting health, safety, and access (ensuring public safety, ensuring traffic flow, protecting property rights, etc.) while limiting speech no more than necessary. It doesn't prohibit peaceful protest. See *Schenck v. Pro-Choice Network* and *Madsen v. Women's Health Center.*

The bill is "**content neutral**" because it does not distinguish between types of protesters or message. No protesters of any kind are permitted within the 35 foot zone, regardless of their position.

The bill also leaves open "**alternative channels of communication**". Protesters may still protest outside the buffer zone boundary.

Buffer zones in other states:

Colorado—100 feet fixed and 8 ft. floating

Montana—36 feet fixed and 8 ft. floating

BUFFER ZONE BILL (S. 1353) FACT SHEET [DKT. NO. 61-10]

History:

The current buffer zone law was enacted in 2000. It establishes an 18 foot buffer zone. Protesters can enter the buffer zone if they remain six feet away from any entering patient or staff member (i.e. "floating bubble"). If given consent, protesters can enter the "floating bubble" zone.

The problem with the current law:

Floating bubbles are problematic because the definition of consent is often subject to interpretation. In 2006, Planned Parenthood League of Massachusetts received 46 written reports of buffer zone violations. Since 2000, only one case has been prosecuted in court but was later thrown out due to the statute's vagueness.

What this new bill (S. 1353) does:

This bill will create a fixed 35-foot buffer zone around the entrances and driveways. No person may stand within 35 feet of an entryway except people entering or leaving the clinic, including patients and staff, law enforcement and other public service employees acting within the scope of their employment, or people using the public sidewalk or street right-of-way to get to another destination. This bill eliminates the floating bubble zone.

Why it is necessary:

This bill will help public safety officers to maintain and ensure civil order. This bill is an effective tool to make the buffer zone enforceable, reduce the social cost

of violence outside these health facilities, and reduce the need for court-ordered injunctions.

Constitutionality:

See injunctive orders in *Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997) and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

The SJC has found the imposition of a buffer zone to be a "**content-neutral**" regulation of speech, even if the buffer zone is directed at anti-choice demonstrators. The SJC has noted that because the intent of buffer zones (in both *Schenck* and *Madsen*) was to protect women entering reproductive health facilities from the harassment and intimidation of protesters, the establishment of the buffer zone was a result of the conduct of the demonstrators, not their speech or point of view.

The first amendment guarantees ample means to engage in public speech. **Legislative time, place and manner restrictions**, if content neutral, will be upheld if they are "**narrowly tailored to serve a significant governmental interest and ... leave open ample alternative channels for communication and information**". (*See Clark v. Community for Creative Non-Violence*, 468 U.S. 228, 294 (1984)). S. 1353 imposes a reasonable "place" restriction, which is "narrowly tailored" to advance "significant" interests of government. The intent of S. 1353 is to allow patients and staff to enter reproductive health facilities without obstruction or interference, not to suppress the speech of demonstrators. Protesters may communicate their message through signs, advertisements, hand billing, etc. at a distance of 35 feet from the facility's entrance.

In *Madsen*, the SJC upheld a buffer zone of 36 feet at reproductive health care facilities.

EXCERPTS OF WOMEN'S BAR ASSOCIATION LETTER [DKT. NO. 52]

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The current Massachusetts Buffer Zone Law is flawed due to its vague consent language and its complexity. Though the current law establishes an eighteen-foot buffer zone outside of reproductive facilities, protesters can be within that zone as long as they are not within six feet of someone entering the facility. This six-foot exception eviscerates the eighteen-foot requirement. Furthermore, if protesters have a patient or employee's consent then they are allowed within six feet of the person. Even though Planned Parenthood League of Massachusetts received 46 written reports of buffer zone violations last year, the current legislation has proven impossible to enforce. Only one prosecution has been considered by the courts and it was ultimately thrown out by the court due to the vagueness of the statute. Therefore, for the public safety of the Commonwealth's citizens, new buffer zone legislation is needed.

There is a clear and compelling need to increase the current buffer zone to protect patients' rights and their safety. For example, there have been incidences of protesters dressing up as Boston Police officers, having Boston Police Department hats, shirts and clipboards, and asking for patients' names and contact information. Patients and employees have been touched by protesters, blocked access to the front door and garage, photographed and filmed in their cars, screamed at within the buffer zone and have had unsolicited literature thrown into their cars. Therefore, the current buffer zone law is inadequate.

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EXCERPTS OF LETTER OF SENATOR EDWARD M. AUGUSTUS [DKT. NO. 52]

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Within the last four years, Planned Parenthood of Massachusetts has increasingly received numerous complaints about buffer zone violations. Those violations range from protestors physically touching patients and blocking access to the front door to photographing and filming into patients' and employees' cars. More serious violations include protestors dressing up as Boston police officers and asking for patients' names and contact information. This behavior is unacceptable for women who are exercising their legal reproductive rights and choices. I am proud to support legislation that will strengthen the buffer zone law to better protect the safety, privacy and dignity of women entering reproductive health facilities.

If implemented properly, Senate Bill 1353 will promise an enhanced degree of security to all of the women in Massachusetts without compromising the constitutional rights of others, such as freedom of speech and freedom of assembly. We should not hide behind the First Amendment while innocent patients and employees are being verbally and physically harassed at clinics across the Commonwealth. This truly is a matter relative to public safety. With the introduction of S. 1353, I believe that the citizens of the Commonwealth will have a fair opportunity to exercise their entitled rights, whether it is their reproductive rights or First Amendment rights.

TESTIMONY OF WENDY KAMINER, DEFENDING DISSENT FOUNDATION [DKT. NO. 52]

May 16, 2007

The Defending Dissent Foundation is a civil liberties group dedicated to protecting the right to protest and dissent from government interference. Formerly known as the First Amendment Foundation, Defending Dissent has its roots in the National Committee to Abolish HUAC, formed in 1960. It works with people and groups whose speech rights are threatened by government action, regardless of their politics or ideologies. Defending Dissent has no position on reproductive choice, though I think you'd find strong pro-choice sentiment among its supporters. What brings me here today on behalf of Defending Dissent is dismay about the effect of this bill on free speech.

I appreciate the desire to alleviate harassment of patients and personnel at abortion clinics, but the proposed 35 foot buffer zone wouldn't simply regulate or attempt to regulate harassment; it would outlaw political speech. The case against the bill is simple: it would impose a prior restraint on speech, prohibiting peaceful, even silent protests within 35 feet of clinic entrances and driveways—where the protests might be most effective. It would also effectively impose different restrictions on protesters at different clinics, given their different physical configurations.

This is a overly simple solution to a complicated problem—the reported difficulties of enforcing the current law and the tendency of some protesters to engage not just in protests but in harassment of individuals patients and providers. But laws restricting speech should be difficult to enforce; if drawn with respect for

the First Amendment and prohibitions on prior restraints, they are, by nature difficult to enforce. Obscenity laws, for example, are difficult to enforce, to the dismay of some and the delight of others. It would be easier to punish obscenity if we simply drew a bright line or created a sort of buffer zone around discussions of sex. It's easy to police harassment of delegates to a political convention when we restrict protesters to designated "free speech" zones, creating buffer zones around entrances to convention halls. But it should never be so easy to restrict political speech.

I understand the anger at protesters who abuse their rights. I understand the impulse to protect patients and clinicians from being intimidated or upset as well as criminally harassed. But protecting people from intimidation or emotional turmoil is no justification for restricting speech. We don't have a right not to be upset, even when seeking medical care. We do have a right to protest state sanctioned medical procedures. Imagine how vigorously pro-choice supporters would protest outside clinics that engaged in mandatory sterilization, if it were legally permissible, as it was once, in the early 20th century. Would you pass a law to restrict those protests, even if clinicians felt intimidated or upset by them?

Protesters sometime abuse their rights to speak, of course; virtually all rights are bound to be abused on occasion, just as legislative power is bound to be abused —sometimes with the best intentions. Please don't let abuses of rights by some individuals persuade you to deny those rights to all.

Finally, this bill is, at the very least, arguably unconstitutional. The U.S. Supreme Court has upheld buffer zones around clinic entrances, so long as they did

not include categorical prohibitions on all protests within the zone—the sort of prohibition included in this bill. In 2000, when the Court upheld a Colorado statute imposing a 100 foot buffer zone around clinic entrances, it stressed that the law "allows a protester to stand still while a person moving towards or away from a health care facility walks past her." The law only prohibited "knowingly approaching" within 8 feet of another person without consent.

But even if the Supreme Court were to uphold this law, we would still oppose it. Like NARAL, Planned Parenthood, and other pro-choice groups, the Defending Dissent Foundation believes that the Supreme Court sometimes gets it wrong in enabling legislatures to restrict rights. The Court allowed significant restrictions on First Amendment rights in the Colorado buffer zone case, but it did not allow the blanket prohibition on speech included in this bill. It would be a sad day for civil liberty if the Massachusetts legislature became less protective of individual rights than the U.S. Supreme Court.

EXCERPTS OF WRITTEN TESTIMONY OF MELISSA CONROY [DKT. NO. 52]

* * *

The Buffer Zone Law of 2000 was passed in order to ensure safe passage to those entering or exiting a reproductive health facility. Unfortunately, the vague language in the law has made it very difficult to enforce. The establishment of a 35 foot buffer zone would eliminate the loose interpretation which effectively nullifies the current law.

Anti-abortion protesters not only impede access to clinic doors, but also create safety issues for the general public trying to use the sidewalks, streets or driveways. Obstructing the flow of traffic (both pedestrian and motor vehicle) can result in injury and property damage.

At Four Women, protesters walk back and forth across the entrance of the driveway, which is approximately 100 feet long. Though prohibited from standing in the entrance of the driveway, they frequently stop there until threatened with police action. There have been instances of picketers either slowing or speeding up to narrowly avoid being hit by cars driven by staff. Patients have reported feeling too intimidated by the pacing protesters to enter the property, and turning back.

Our clinic is located in a medical office park with several other facilities adjacent to our building. Patients and staff of these other offices complain of having to cross this line of protesters. The parked cars and large signs of protesters have obstructed the views of motorists, resulting in accidents. A 35 foot buffer zone will prevent disruptions in the entrance of the drive-

way and the street on either side. Consequently, our patients and staff will feel safer, and relations with the other offices and neighboring residences will improve.

The proposed amendment to the buffer zone law is crucial to women's access to reproductive health care, and to the safety of providers. The ambiguity of the existing law is resolved by the clear limitations set by this legislation.

EXCERPTS OF LETTER OF SHERIFF ANDREA J. CABRAL [DKT. NO. 52]

* * *

Current so-called "buffer zone" laws had their genesis in an injunction issued by Superior Court Justice Peter Lauriat over 15 years ago. As an Assistant Attorney General in the Civil Rights Division of the Attorney General's Office, I prosecuted a number of cases, in several jurisdictions throughout Massachusetts, involving violations of that injunction by well organized defendants. Acts of harassment, intimidation, assault, and battery were then and continue to this day to be the *modus operandi* of too many anti-choice protesters.

Beyond the traumatic impact of such behavior on individual clinic employees and patients who are targeted, this conduct frequently poses a larger risk to public safety, particularly when the protest involves the use of tools or other implements designed to thwart efforts at dispersing protesters who resort to illegal means. Cities and towns incur considerable expense responding to such protests and sometimes must divert resources from other important law enforcement needs.

S1353 is a balanced bill that protects the legitimate exercise of free speech and individual privacy, safety and health care access rights. I respectfully urge all members of the committee and their House and Senate colleagues to vote favorably on this measure. Thank you for the opportunity to express my support.

* * *

TESTIMONY OF GAIL KAPLAN
[DKT. NO. 53]

TESTIMONY FOR BUFFER ZONE HEARING

I have been a volunteer at Planned Parenthood since 1973, and an escort at the Boston clinic for the past 10 years. Additionally, I have done counseling and referrals for many years in the Boston clinic. My concern is growing regarding the buffer zone.

1. The protestors are moving closer and closer to the main door. They scream and block the way for the patients to get into the clinic. We fill out police reports almost every week regarding the way they encroach upon the door, but nothing has changed.

2. They get very close to the patients and escorts inside the buffer zone—I have often been spit upon while escorting a patient into the clinic since they got so close to me while shouting their protests.

3. They attempt to hand out brochures to the patients inside the current buffer zone and even when the patient asks them to stay away, they continue with their attempts. It creates a significant amount of stress for the patients who only see a wall of people approaching them and screaming at them. Again, it is very difficult to get inside the door.

4. When it is raining it is exceptionally bad. Many of the protestors are inside the buffer zone with very large umbrellas and have no regard for who they hit with them. I have often been swiped with the points on their umbrellas and have nearly fallen to avoid being hit. One week

an escort was nearly hit in the eye with the umbrella.

5. They harass the escorts with verbal abuse and brochures very close to the front door. It is an attempt to get us to quit and to distract us from helping the patients.

6. The guard has to constantly ask them to back off our private property.

7. Having a buffer zone law which is enforced would allow protestors to make their statements without endangering the escorts, the patients, and PPLM employees from entering the clinic.

Testimony by Gail Kaplan

EXCERPTS OF LETTER OF SENATOR GALE D. CANDARAS [DKT. NO. 53]

* * *

The strictly enforced thirty-five foot buffer area proposed by this legislation would achieve several important goals. First, it would serve the needs of law enforcement officials by dictating a clear line between legality and illegality that does not currently exist. A clear and precise declaration of the rights of patients and protesters alike will serve both parties well, and eliminate the ability of ill-intentioned individuals to take advantage of "gray areas" in existing law.

Not unlike the Commonwealth's law forbidding political campaigning within 150 feet of a polling place, this bill will provide individuals the opportunity to gain entry to a protected facility free from the threat of coercion and other intimidating conduct from demonstrators or others intent on inhibiting entry. As legislators, we are acutely aware of the tactics that some opponents of choice have used to prevent women from seeking medical assistance at clinics. We have witnessed and condemned the violence that occurs in these facilities, which includes assault, battery, and even murder.

Another goal realized by this legislation is the protection of a woman's privacy and her constitutional right to choose. That right is the law of the land and the law of this Commonwealth, and no woman should have to run a gauntlet of opponents to exercise it. Privacy is at a premium in these delicate situations, and giving a woman sufficient space to pass safely into a medical facility should be the minimum amount of protection we provide.

Furthermore, the presence of anti-choice protestors at a clinic, whose goal it is to confront women seeking abortions, suggests to the public that every woman entering said clinic is there to secure said procedure. The ability of demonstrators to confront women directly reinforces that assumption in the arena of public opinion. Whatever a woman's reason for entering such a facility, she should not be subjected to the glare of protestors and demands of sidewalk "counselors."

The interests of members of the medical profession and their staffs are also of concern, and will be protected upon the passage of this important legislation. Reproductive health care facilities provide an expansive range of employment opportunities for physicians, nurses, x-ray technicians, secretaries, laboratory assistants, janitorial staff and the like. With demonstrators literally on the doorsteps on these facilities, patients and prospective employees alike will defect, causing a loss of revenue and imperiling the economic vitality of the clinic, as well as the health of its clients. The ability of health care professionals and their various assistants to provide quality services cannot be subjected to the undue interference and intimidation that result from protests and other demonstrations.

* * *

In closing, I urge the Committee to resist the notion that this legislation is a pro- or anti-choice bill, or that it is intended to silence protestors. This is a public safety measure that accommodates the constitutional rights of both patient and protestor. The bill is aimed at conduct, not speech. It is important to remember that a verbal assault—words which place the targeted person in fear of imminent harm or offensive bodily contact—is a completed crime, not protected speech. I

urge the Committee to report this legislation favorably to the General Court.

* * *

EXCERPTS OF WRITTEN TESTIMONY OF ATTORNEY GENERAL COAKLEY [DKT. NO. 53]

* * *

III. The Reasons Why a Fixed Buffer Zone is Necessary

Replacing the current floating buffer zone with a fixed buffer zone is appropriate and necessary. I support the bill's recognition that "clearly defined boundaries improve the ability of safety officials to protect the public."

The vast majority of women who enter these facilities daily receive routine gynecological care, e.g. annual exams, pap smears, birth control and screening tests for breast and cervical cancer. There are certainly others who seek medical procedures that result in termination of pregnancies. For those women, this is a time of particular vulnerability and emotional strain. They are women of all ages, including teenagers, some of whom are accompanied by their parents, grandparents and social workers.

As women approach the facility entrances, they are routinely confronted by protestors who stand inside the existing 18-foot buffer zone. Throughout the week, and especially during the morning hours, protestors routinely gather outside of the entrances and driveways to the facilities, either on the street or sidewalk. On Saturdays, for example, as many as 50-70 protestors appear at the Boston's Planned Parenthood location. These sometimes include groups of schoolchildren who are bussed in from various cities and towns by various anti-abortion organizations.

Facility employees, volunteers, patients and prospective patients are routinely harassed as they try to enter and exit facilities for medical counseling and treatment. For example, at the Boston location, which has a recessed door, protestors are able to stand close to the entrance, with some protestors standing right at the entrance. Demonstrators regularly crowd facility entrances and surround women, facility employees and volunteers with graphic and discomfiting pictures of aborted fetuses, and shout at and taunt them calling them "baby killers" and "murderers."

The current law provides no clearly defined boundary because it is a "floating" buffer zone within a defined radius of eighteen feet, so the buffer zone effectively moves and shifts as people pass along the public way to facility entrances or driveways. Either ignoring the law, or inadequately measuring the six-foot distance around a moving person, protestors routinely invade the existing buffer zone in violation of the law. This fact alone has made it very difficult if not impossible for police to be able to immediately or ever determine whether a violation has occurred.

Another problem with the existing law is the inability to discern whether a patient, her companions, or facility employees have consented to a given protestor's approach. Some protestors have said that they believed that a patient "consented" because of the way she made eye contact or because a patient uttered a statement in response to a protestor's comment (even if that statement was not one of consent). Often times, protestors aggressively attempt to thrust leaflets into patients' hands as they enter the facility, some going so far as to touch or bump up against patients or employees as they try to access the healthcare facilities. As a result, patients and employees are forced to step

around or through the protestors as they make their way into the building. We have heard of some cases where women arrive at the facilities and then leave because they are too upset to pass through the gauntlet of protestors.

Protestors also stand and block cars as patients and employees attempt to enter the driveway or garage entrance to these facilities. Other times, protestors circle cars and put their faces against, or in close proximity to, the car windows to scream at and sometimes videotape people in their cars. In some cases, protestors throw anti-abortion literature and leaflets into people's cars as they enter or exit the facilities. Even more egregious are the protestors who dress as Boston Police Department officers and approach women and their companions at close distance, pretending that they are escorting them to the clinic's entrance, only to taunt them or force leaflets into their hands as they make their way to and from the healthcare facilities.

All of these actions can and do easily spark reaction and response and create an unsafe, dangerous risk along our public ways. The actions directly impede the normal flow of traffic along the Commonwealth's public ways and sidewalks and hinder women's ability to access reproductive healthcare. Given the lack of a clearly defined buffer zone boundary, it has been very difficult, if not impossible, for police officers to monitor the distance these protestors maintain between themselves and the persons approaching the facilities and determine if there has been a violation; in other words, to enforce the law.

IV. The Amendment Protects First Amendment Rights

As chief law enforcement officer of the Commonwealth, I am obligated to protect and enforce the rights of all of the citizens of the Commonwealth. Consistent with that obligation, I have an interest in ensuring that citizens' rights to access reproductive healthcare are secure, as well as ensuring that citizens' equally important rights to free speech and peaceful assembly are protected.

I strongly support people's free speech and right to assemble, demonstrate and protest. Those rights have served our Commonwealth and our nation well over the past 225 plus years. The proposed amendment, however, is a proper time, place and manner regulation. It applies only during business hours, which is when the flow of traffic is the greatest. It is designed to maintain a proper flow of traffic and prevent congestion around those facilities. It is content-neutral and narrowly tailored to serve the significant governmental interest of ensuring public safety in and around reproductive healthcare facilities. And it leaves opportunity for alternative means of communication.

If the bill is passed, demonstrators will still be able to assemble, hold signs, pray, sit in vigil, chant, counsel, leaflet and shout, simply not within the 35-foot buffer zone. They will still be able to exercise their First Amendment rights. If patients or prospective patients want to accept literature or converse or engage with protestors, they will still be able to do so. The only difference is that now it would not be in a way that blocks access along a public way. This is an important and appropriate legislative balance of competing and equally protected constitutional rights.

Seven years ago, our Supreme Judicial Court reviewed an earlier proposed fixed buffer zone for twenty-five feet and said that it was constitutional. Other courts across the county have upheld fixed buffer zone laws as reasonable and constitutionally permitted.

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EXCERPTS OF TESTIMONY OF KELLY O'BRYAN, POLITICAL DIRECTOR, NARAL PRO-CHOICE MASSACHUSETTS [DKT. NO. 53]

* * *

I would also like to speak on behalf of reproductive health clinics that support this bill, but could not send representatives to be here today. In December 2006, NARAL Pro-Choice Massachusetts surveyed reproductive health clinics in Massachusetts, including:

- Alternative Medical Care of the North Shore, Lynn
- Caring for Women, Amesbury
- Four Women, Attleboro
- Merrimack Valley Women's Health Services, Methuen
- North Shore Women's Center, Lynn
- Planned Parenthood League of Massachusetts, Greater Boston Center
- Planned Parenthood League of Massachusetts, Western MA Center, Springfield
- Planned Parenthood League of Massachusetts, Central MA Center, Worcester
- Women's Health Center, Hyannis
- Women's Health Services, Chestnut Hill

Six of the ten clinics surveyed describe protestors as a significant problem for patients and staff and two more reported a semi-regular to regular presence of protestors. Of those who reported protestors as a problem, four said that expanding the buffer zone to 35

feet would help address the issue. All the clinics in Massachusetts urge legislative support for this bill.

The following is an example by one clinic reporting significant problems with protestors which could be mitigated by a fixed 35 foot buffer zone:

Four Women, Attleboro: The Four Women clinic is located in Attleboro and provides abortion services and general gynecological care. The clinic is at the back of a larger medical office complex. The protestors harass patients and clinic staff by walking back and forth across the entrance of the driveway, which is approximately 100 feet long. Though prohibited from standing in the driveway entrance, they frequently stop there until threatened with police action. There have been several instances of picketers deliberately walking in front of cars and narrowly avoiding being hit by staff and patients. Patients have reported feeling too intimidated by the pacing protesters in the driveway entrance and turning back.

Because Four Women is located in a medical office park with several other facilities adjacent to the building, patients and staff of these other offices complain of having to cross this line of protestors. A 35 foot buffer zone will prevent disruptions in the entrance of the driveway and the street on either side by clearly demarking where protestors can or cannot stand.

These protesters not only impede access to the clinic, but also create safety issues for the general public trying to use the sidewalks, streets or driveways. Obstructing the flow of traffic (both pedestrian and motor vehicle) can result in injury and property damage. A clearly demarcated fixed Buffer Zone of 35 feet will help patients and staff to feel safer and relations with

the other offices and neighboring residences will improve.

I urge the Committee to give this important and common-sense piece of legislation a favorable report.

* * *

LETTER OF LIAM T. LOWNEY
[DKT. NO. 53]

Dear Senator Barrios and Representative Costello,

My name is Liam Lowney and I am writing to you in support of Senate Bill 1353 wearing two hats. Professionally I serve as the Chief of Victim and Witness Services for Attorney General Martha Coakley. In that capacity, the safety of the public is our greatest concern. As you are aware the Attorney General spoke eloquently on behalf of the Office today. Therefore, I am writing today to speak instead for someone that can't speak for herself: My sister Shannon.

Shannon Elizabeth Lowney was 25 years old when she was killed while working at the Planned Parenthood Clinic in Brookline. I have a rule not to identify my sister by the way she died, so to that end it's important that you understand who she was before December 30, 1994. Shannon was a bright and intelligent young woman. She was 5'9", had long brown hair, and bright blue eyes. Her smile was infectious. She was the quintessential middle child wedged between Meghan and myself. We grew up in Fairfield, Connecticut, and were raised by two public school teachers. Shannon was a musician and an amazing student. She loved to learn. After high school she went on to graduate from Boston College, *Magna Cum Laude*, and had applied to the Boston University School of Social Work at the time she was killed. Each of us were taught that what you do each day matters and it's important to make a difference in the world around you. It is for that reason that Meghan has worked to end homelessness in Connecticut, I work with crime victims, and Shannon went to work for Planned Parenthood.

She was so proud of her job. She worked as the receptionist and a Spanish translator and was the first to welcome clients as they entered Planned Parenthood's doors. She believed deeply that women and children had the right to safe and affordable healthcare. That is why she worked there. She spoke of her work often and was so grateful to have the opportunity to help people each day. She also told us of her frustrations at work. Shannon was the first to open the Clinic each day. It is because of this that the protesters out front named her "Public Enemy #1." Shannon was troubled by this. Her first response was to discuss the differences in opinion. That was always her first response. After listening to their comments she would ask them if they knew that Planned Parenthood offers numerous services. She would explain the need for all of the reproductive health services they offered and ask if they could recognize that. Shannon finally found that she could not have a conversation with them. She found this truly frustrating. As Shannon spoke to my family about her morning routine I remember my father asking, "Well, where do you park? Do they know which car is yours? Could they do something to your car?" The car turned out to be fine, but never did it occur to us that we could lose her. Now we all know.

Almost 13 years later, men and women continue to show up to work at reproductive health clinics each day. They do this and choose to make lower salaries because, like Shannon, they have a desire to help others live healthy lives. In today's environment of skyrocketing health care costs they show up to create an option for the underserved. They seek to make sure that each man and woman is afforded access to quality reproductive health care. Almost 13 years later something else remains the same. Like Shannon, each of these em-

ployees walk through protestors calling them names, shield patients from abuse, and, yes, we have even seen their cars and license plates photographed.

I'm not asking you to support Senate Bill 1353 because you feel sympathy for me or my family. I'm asking that you support this bill because it will allow employees the ability to feel safe as they go to a job they should be proud of. It will allow the patients the chance to receive the services and information they need, without feeling ashamed or afraid. I'm asking that you support this bill so that the next time an employee sits down with their family to discuss their new exciting job, they can let them know that not only is their car safe, but they are too.

On behalf of my family, we thank you for your work on this issue and giving me the opportunity to address you today.

Cordially,

Liam T. Lowney

Marshfield, MA

(617) 921-2507

TESTIMONY OF DIANNE LUBY, PRESIDENT AND CEO, PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS [DKT. NO. 53]

Dear Chairman Barrios, Chairman Costello, and members of the Committee on Public Safety and Homeland Security:

I am writing on behalf of Planned Parenthood League of Massachusetts, our state's leading provider of reproductive health care, to express our strong support for Senate Bill 1353, "*An Act Relative to Public Safety.*" This bill will strengthen the current law by establishing a clear and enforceable 35-foot fixed buffer zone outside of the entrances and driveways of reproductive health facilities. This proposal will protect the privacy, dignity and safety of patients when they are simply trying to get to their doctors appointments, pick up contraceptives, get an HPV shot, or attend an educational or preventive health care session.

The current Buffer Zone Law, while well intended is flawed, makes police work harder, and has been nearly impossible to enforce due to its complexity and the vagueness of the language surrounding consent. All one has to do is stand in front of Planned Parenthood any morning and you can see the existing law being violated, yet there has not been one, not a single successful prosecution to date because of the vagueness of this statute. Patients and staff deserve the protection of a law that is clear to all parties and enforceable by law enforcement and our judicial system.

Planned Parenthood's top priority is the care, privacy and safety of our patients and staff. We know well the horrors of violence in the workplace. An organization is never the same after experiencing what we did

at Planned Parenthood. The fear of that violence is an issue we deal with every single day. We spend over $300,000 a year on security in an effort to keep our patients and staff safe. Our terrific, dedicated guards, our security technology, and our metal detectors serve as a daily reminder of the potential dangers we face. It is true that no law could entirely prevent another determined gunman from committing another atrocity, but it is appropriate and necessary to pass a law that will reduce the potential for violence by defusing the in-your-face tension that surrounds our facilities on a daily basis.

We had approximately 55,000 patient visits last year. More than two-thirds of those visits were for non-abortion related services—they were for preventative health care visits. People being responsible for their sexual health. Regardless of their reason for coming, our patients and visitors are subject to intense, in-your-face harassment. I spend many Saturday's at our Boston facility, when the activity of protesters is most intense, and I see what goes on first-hand. I see:

- Protestors screaming at patients and employees inside the current "buffer zone", usually right at the doorway, including language that is judgmental and hurtful
- Protesters photographing and filming into patients and employees' cars and taking photos of license plate numbers to post on websites
- Protesters standing in front of cars and the keypad to the garage to block access, so that they can throw pamphlets and other propaganda into cars entering the garage

- And most deceptively I've seen protesters dress up wearing Boston Police T-shirts and hats, trying to collect patient contact information, videotaping, and in other ways trying to intimidate those who are simply exercising their legal right to seek confidential medical services

I also see the dignity and the courage of our patients and staff, and especially the courage of our volunteer escorts, who go out there every Saturday morning and experience the harassment first hand, while doing their best to protect others from it.

The current law simply doesn't work. It relies as you know on a scheme involving a floating, six-foot zone of personal privacy that travels with the person. What happens in real life, as demonstrated through the images you've already seen, is that the protesters stand right in front of the door, so that patients and staff can't possibly get into the building without going within six feet of the protestors. The protestors then interpret that as consent.

Our Law enforcement officials have done the best they can to work with a flawed statute, and we appreciate their efforts, and the working relationship we have with them. We appreciate very much the law enforcement community being here in such numbers today to support a stronger, more enforceable law.

We are not trying to prevent anyone from expressing their point of view. Everyone has a right to be heard. However, that right has to be balanced against the right to access health care privately, without fear of violence and intimidation, and the current law does not strike the appropriate balance. Senate Bill 1353 allows both rights to be protected.

For these reasons, on behalf of Planned Parenthood League of Massachusetts, I urge you to give Senate Bill 1353 a favorable report.

Sincerely,

Dianne Luby

President/CEO

STATEMENT OF THE ACLU OF MASSACHUSETTS [DKT. NO. 53]

May 16, 2007

STATEMENT OF THE ACLU OF MASSACHUSETTS

RE: SB 1353: An Act Relative to Public Safety ("the buffer zone" bill)

The American Civil Liberties Union of Massachusetts (ACLUM) is a nonpartisan membership organization with approximately 22,000 members. Since its founding in 1920, ACLUM has vigorously defended the right to free speech on the public streets, and has frequently appeared in the courts of the Commonwealth to defend that right. At the same time, ACLUM has long been committed to preserving a woman's right to reproductive choice. ACLUM has participated in nearly every major reproductive health care case in Massachusetts over the course of the past thirty-five years including Moe v. Secretary of Administration and Finance, 382 Mass. 629 (1981). We have also consistently argued, in this context and in others, that constitutional rights can quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation and harassment. Accordingly, ACLUM, as *amicus curiae* in Planned Parenthood League of Massachusetts v. Blake, 417 Mass. 467 (1994) and Planned Parenthood League of Massachusetts v. Operation Rescue, 406 Mass. 701 (1990), supported the position that clinic protestors who had engaged in prior unlawful conduct could be subject to a narrowly crafted injunction imposing reasonable time, place, and manner restrictions on their demonstration activity.

ACLUM deeply believes that the volatile issue of abortion clinic protest must not be resolved by sacrificing either the right to reproductive choice or the right to engage in peaceful protest. Rather, the burden in each case is to arrive at a solution that accommodates both rights, and that does so in a principled way that is consistent with our constitutional tradition. ACLUM has opposed the enactment of various "buffer zone" proposals on the grounds that they are unnecessarily restrictive of freedom of speech and, perhaps more importantly, establish a dangerous precedent for the restriction of protest in other areas.

The activities which are the target of this legislation take place in areas which are "quintessential public forums," Benefit v. City of Cambridge, 424 Mass. 918, 926-927 (1997), areas which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. at 515. "[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989, quoting Clark v. Community for Creative Non-Violence, 469 U.S. 293 (1984).

The difficulty with this legislation, as well as its predecessor, is that it based on the insupportable premise that any expressive activity within a certain distance of the entrance of a reproductive health facility will interfere with the right of access to the clinic, and

that it is therefore necessary to prohibit all such activity. Within the buffer zone, the statute would prohibit not only aggressive harassment and physical obstruction, but it would also ban silent witness, and even respectful efforts to distribute information and activities which are supportive of reproductive choice. The reasoning behind this bill is the same reasoning which is all too often used to justify broad restrictions on political protest—such as confining those with dissenting viewpoints to a "protest zone"—out of concern that it could interfere with the target of the protest. This is not a restriction which is "narrowly tailored" in any meaningful sense and, as a result, could provide a legal justification for future restrictions on the speech and assembly rights of groups such as trade unions, anti-war and environmental activists, and others.

The overbreadth of the buffer zone legislation underscores the difficulty of formulating general rules affecting freedom of expression. It is precisely for this reason that the ACLU of Massachusetts has taken the position that protection of the right of access to reproductive health care from harassment and intimidation from the opponents of reproductive choice is more appropriately addressed in the courts, where, on the basis of a showing of actual interference by specific individuals or groups, a more narrowly tailored remedy can be crafted and enforced without encroaching on the rights of those whose activities are wholly lawful.

EXCERPTS OF TESTIMONY OF WILLIAM B. EVANS [DKT. NO. 59-2]

* * *

My name is Captain William Evans. I'm currently the commander of South End, Back Bay, Lower Roxbury and the Fenway section of the City of Boston. For the last nine years prior to this assignment, I was commander of the Allston/Brighton section of the city.

I became very familiar with what was happening at 1055 Commonwealth Ave., which is Planned Parenthood. I know every day we had to deal with the issues in and around the Planned Parenthood Center out there. This law, the way it stands, the current buffer zone with the 18-foot buffer zone, makes it very difficult for us to enforce the law.

A lot of people are under the misconception that it prevents protestors from going into that buffer zone, which is incorrect. Protestors can stand up right in front of the door. A lot of them hold signs right there. As long as they stay stationary, you know, they can stand in front of that door.

What they have to do is make an approach. Now what an approach is is very hard to determine; whether they stick out their hand, that's an approach; where they take a step forward, that's an approach. Basically, it turns us into basically something like—I like to make the reference of a basketball referee down there, where we're watching feet, we're watching hands. We're watching to see if there's any movement of the protestors, you know.

Week in and week out, we are constantly receiving calls down there, both from protestors and from Planned Parenthood on violations. I think clearly hav-

ing a fixed buffer zone, where everyone knows the rules and nobody can go in that and protest, will make our job so much easier. I think you've seen in the video; you see what we have to deal with. You know, it's a very difficult rule to enforce.

You know, there's the misconception that it's a fixed area where no protestors can go. That would be great. That would make our job so much easier.

Right now, you know, it's constant watching. It's constant tying up of resources and, you know, we've had to deal with [indiscernible] seven years. I've been down there numerous Saturdays where we have over 100 protestors every Saturday and a lot of them go right up in the faces of patients entering the premises.

So I encourage the Committee and the legislators to support this bill. Not only will it safeguard the patients going in there, but it will also make the public safety official's job a lot easier. So I welcome the 35-foot buffer zone.

* * *

CHAIRMAN COSTELLO: Captain, real quickly, do you—how many arrests have you made down at, for instance, Commonwealth under the current condition?

CAPTAIN EVANS: I would say, Chairman, no more than five or so arrests. I know within the last year I've made one myself outside, inside the buffer zone. Again, a very difficult law to enforce, what an approach is, what isn't. I mean, like I said, people can stand inside the buffer zone, and given the current set up of Planned Parenthood there, their door is in 10 feet of—actually, their buffer zone is really only 8 feet outside because of the setup.

So it's such close quarters as it is there that everybody is in everybody's face, no matter what. So the buffer zone basically is no good, it really isn't, because just the proximity.

It's almost like a goalie's crease out there, you know. It's like if you're in there, you're going to be within the 6 feet, no matter what.

So given that fact, it makes it very difficult for us to say someone is violating it because they're allowed to stand outside the door, with the sign in their hand.

CHAIRMAN COSTELLO: I think you've given us an explicit explanation what an approach is. And again, have you ever charged with criminal threatening or harassment or some of the newer—I know we started stalking and out and out harassment, have those been employed at all?

CAPTAIN EVANS: Yeah. We've trying everything, honestly. We've tried violation of the buffer zone, and we've brought a few cases up to Brighton Court and the court has basically not supported us in that, you know what I mean, given the First Amendment.

Chairman, we know all the players down there. We know the regular protesters. We back up the stay-away orders and nothing seems to work down there.

I think you've seen the video. You've seen the pictures here. They are wearing police hats and police uniforms. We've asked the court to stop them from doing that but again, First Amendment right. They're not identifying themselves as policemen. They're just wearing, you know, outfits that they can buy.

Unfortunately, there's a lot of paraphernalia out there they can buy. But we've tried everything, and I

think the only thing honestly that will keep these people out and the patients safe is to establish a fixed zone. That way there's no watching feet, watching hands and allowing protestors right up in their face.

ATTORNEY GENERAL COAKLEY: Chairman Costello, if I could just add to that. You know from your experience that it is difficult for the Boston Police on the scene to determine whether there's probable cause. The ability to enforce that in a courtroom beyond a reasonable doubt is almost nil, and the other statute you mentioned or at least one other circumstance is that for many of these people, it's a one-time occurrence, stalking their cars.

This is a very unique situation, and I think as District Attorney Keating said, has a great ability to resolve problems before they start.

CHAIRMAN BARRIOS: I have a question for the Captain. I'm looking at that photo. I just want to make sure, because I'm not sure everybody in the audience can see that. That's a photo, presumably that is a photo of somebody who has driven up to go into the clinic, right? And the person who's face—who's standing next to the car has a shirt, the back of which says Boston Police.

Now, my understanding is the way the law currently works is, if that person were to approach, the person in the car might reasonably expect that person to be the Boston Police because they have a shirt saying they're the Boston Police.

CAPTAIN EVANS: Right.

CHAIRMAN BARRIOS: And so if the person in the car were to say, oh, okay, because they think it's a police officer, not a person, then that person's allowed

to legally be within 6 feet of them, right? There's nothing you can do—

CAPTAIN EVANS: Right.

CHAIRMAN BARRIOS: —to enforce the law, once that other person discovers, in fact, this person is impersonating a police officer and not actually a police officer.

CAPTAIN EVANS: That's correct. I mean, the whole question of whether they're consenting is what happens here and the fact that they started talking to them, we've found that that's consent basically.

So it's a very difficult law, and we've tried to prevent them from wearing what they're wearing but we've had no luck with that, so it's very difficult.

These two individuals are down there day in and day out. You know, they've been arrested, both of them have several times, but you know, they're back there every day, every Saturday.

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EXCERPTS OF TESTIMONY OF LIZ MCMAHON [DKT. NO. 61-7]

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Many of you here may not be aware of why a bill such as this is necessary, and I want to explain what happens at your local Planned Parenthood every Saturday morning, every week.

There are several long-time protesters who appear in front of Planned Parenthood on Saturday mornings by around 8:00 a.m. They set up signs and posters in front of the building's main entrance on Commonwealth Avenue. Most often, the large posters feature gruesome pictures of dissected fetuses or ultrasound sonograms. There is no reason for these photos other than to scare, humiliate and deter women from entering.

When women approach the building on the sidewalk, protesters fan out and approach them. The protesters make almost no distinction between women on the sidewalk. Many are on their way to the grocery store next door, others are merely passing by. Some are going to the clinic for an annual gynecological exam, for birth control pills, for medical advice, and sometimes for an abortion. All women who pass near the entrance are treated as potential abortion patients.

At first the protesters try to offer alternative medical treatment facilities with pamphlets and forced advice. It seems to an observer that they feel desperate to prevent people from entering the clinic. When simple entreaties fail, protesters start screaming about the horrors within the clinic. One protester who appears regularly spends hours screaming "They're killing babies here!" to every person who passes by.

The clear intent of the vast majority of protestors is to deter people from entering the building at all. The current buffer zone is vague and difficult to enforce. It does not permit protestors to 'approach' anyone without consent in the zone, but it does not speak to standing still in front of the building's entrance and thereby forcing patients to approach them.

* * *

EXCERPTS OF TRANSCRIPT OF 2007 HEARING [DKT. NO. 63-4]

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[REP. WALZ:] I would like to begin with an observation about the proposed amendment to our existing buffer zone law. As elected officials and as voters, all of us are familiar with a buffer zone that currently exists in our law, which is the buffer zone that around voting, polling places. There is a fixed buffer zone of 150 feet around all of the polling places in the Commonwealth, so voters can enter polling places unimpeded. That balances the voter's rights to come into the polling place with the rights of people to participate in the electoral process and exercise their rights under our Constitution to campaign.

What we're seeking here is to amend the existing buffer zone law around healthcare clinics to establish a fixed buffer zone of only 35 feet, so much smaller than the 150 feet that we're accustomed to around polling places, and so for that 35 feet, we think that is an appropriate balance and one that strikes the right balance between First Amendment rights of protesters and the rights of women and other patients and family members and staff members to enter unimpeded into the healthcare clinics, so to recognize that there are competing rights and interests here, just as there are at polling places, and we think a 35-foot fixed buffer zone strikes the right balance to protect women entering and exiting the clinics.

* * *

REP. FESTA: Mr. Chairman and Members of the Committee, one of the reasons why I wanted to speak, and I'll be specific to a particular point, is to give some historical perspective here.

We, as you know, are operating under a law and an arrangement, if you will, that was frankly a brokered compromise at a time when for many, many years, no form of buffer zone bill was even on the floor of the House to be debated; and I, along with a couple of other members of the House, in trying to resolve the question of how can we move forward, in the process of negotiations with the former Speaker, there was a good-faith effort to have both those who were concerned about the First Amendment issues—and I would say parenthetically, all of us I think in this room recognize that there are First Amendment rights here that need to be respected—but those who have that point of view, and many of us who shared the concern certainly at the time, that without unfettered and reasonable access to these health services, that many women were being intimidated from having those services provided in an appropriate manner.

And so we went through a process of negotiation that ultimately resulted in what we have now as the law. It was known at the time that it was an imperfect compromise, that frankly it wasn't clear when we did it whether it was going to really make a difference with regard to how we would strike that balance.

Now, I think it's clear, frankly today, that having had the years of this law in effect, that substantially the concerns have been addressed, but that there are, in fact, defects in the law that need to be corrected.

I think this bill, quite frankly, strikes the balance in a way in 2007 that we can acknowledge, does give due respect for those who feel that they have need to express their objections to this whole situation, and at the same time acknowledge that 35 feet is quite reasonable, as the Senator just pointed out, as the law clearly

states, when you're dealing with analogous, arguably even less compelling concerns with regard to, you know, voting, et cetera, that 35 feet is frankly very reasonable.

And I think the last point to be made is this. If we—if you as a Committee were to recommend this bill, I think the message that goes out from that is that a legislature, like the law, is fluid, willing to revisit, willing to acknowledge that balances and compromise are a continuing process, that the law should not be static; and that this bill, I think, fundamentally does what needs to be done today, which is to give that protection and also afford the right to those who are concerned to express their views.

* * *

[ATTORNEY GENERAL COAKLEY:] I will not duplicate what you just heard very effectively from the legislators on the wisdom of the passage of Senate Bill 1353, but I want to add a couple of different points this morning. I would note that part of what we want to stress is that this is a much-needed now and warranted change in the law that I believe balances appropriately the Constitutional concerns and the public safety concerns, and let me just address that very briefly.

As you know, the only changes that we are recommending, that the bill recommends that we are in support of, is the change in the size of the zone and the fact that it be fixed; in other words, instead of having an 18-foot with a 6-foot floating piece inside, it only makes sense, I believe, to establish something fixed, if only from a law enforcement perspective. Let me just address that for a minute.

What you just saw ably demonstrated by Representatives Sciortino and Walz was how it would work in

the 35-foot zone, and I want to tell you why it doesn't work now, and I want to show you a very short clip of what actually happens in one of the clinics because the bill is vague and because it is unenforceable.

Keep in mind, also, that the majority of women clients, who are entering these facilities, are going in for normal procedures, updates on a GYN exam, to get birth control bills. There are clients who are going in for procedures to terminate, abortions, but many of them are not. All of them are presumably in a situation where there's a healthcare situation. It is stressful for them. It is not appropriate for them to be approached in the way that I'll show you shortly happens [indiscernible] manner.

This is a time when those people going into the clinics, particularly, should have the protections that a 35-foot zone would give them, and I would note specifically, as mentioned by the legislators, when people are going to vote, they get a 150-foot zone, and we don't protect anything more than we do political speech, the ability to talk about issues and political speech, so that certainly gives you the reasonable basis for a 35-foot zone that is appropriate.

When women approach facility entrances, they're routinely confronted by protestors who stand often inside the existing 18-foot buffer zone throughout the week on a daily basis, and there are protestors who take these up as shifts, as a regular position for them. They will—on Saturdays, for example, as many as 50 to 70 protestors are here at Boston's Planned Parenthood location. They sometimes include groups of school children, who are bussed in from various cities and towns by anti-abortion organizations.

We also have employees, volunteers, patients and prospective patients who are routinely harassed as they try to enter and exit facilities. In Boston, which has a recessed door at the Planned Parenthood facility, protestors are able to stand close to the entrance, with some protestors standing right at the entrance.

Demonstrators regularly crowd facility entrances and surround women, facility employees, and volunteers with graphic and discomforting pictures and shout and taunt, calling baby killers and murderers, and I would ask you to look briefly now at a clip of what happens on a regular basis. This is not an unusual demonstration. This happens almost routinely at many of these clinics.

The protestor has the yellow raincoat on. You can see that as—and I know it's a little jerky, but as this woman in the corner approaches, the individual in the yellow raincoat approaches, follows her into the entranceway. There's no audio here, but you can imagine that there's verbal approach here. There's been no consent given to speak.

You can see that another person comes—the person in the blue is also a protestor. They approach, I believe breaking the law on a routine basis, the laws that currently exist, individuals who are entering the clinic. Here are workers for the clinic who clearly are approached, are touched. That's clearly against the law, by people who—I'm not questioning the sincerity of their beliefs, but do not, I believe, have the right to harass and intimidate under the Constitution.

Again, the protestor in the raincoat, everybody who comes by is approached with that sign, with verbal intimidation, and particularly as we get to the end,

you'll see that there's an individual who approaches the car, sticks her head in the car [indiscernible].

This is an unenforceable, 6-foot loading buffer zone, and I do this not because it's so dramatic, (short skip in DVD) Boston Police or Brookline police, everyone to enforce the law.

It's difficult to make that determination, so as just a practical matter from a law enforcement point of view. The Legislature, in its wisdom, should say that we want to cut down on the traffic problems, the ways in which these interactions both break the law and can inspire other incidents that would be against the law.

I think you will hear from the Boston Police, who deal with this, that it's become an enforceable—unenforceable law, and I would note that if the bill is passed, as I know you know, there is still protection within the 35-foot buffer zone for the First Amendment rights of those protestors.

* * *

UNDERSECRETARY HEFFERNAN: Thank you, Mr. Chairman. Good morning. My name is Mary Beth Heffernan. I'm the Undersecretary for Criminal Justice, and I am here representing Secretary Burke and offering remarks in support of Senate Bill 1353 on behalf of Governor Patrick and Lieutenant Governor Murray this morning.

* * *

This legislation would increase the buffer zone surrounding entrances and driveways of the reproductive health facilities in the state. Clinics have documented, as you can see on the video as well, they've documented the following violations by protestors: Folks dressing up as Boston police officers, asking for patients' names

and contact information, blocking access to the front door of the clinic, consistent screaming at patients, employees inside the bubble zone, touching the arms and shoulders or backs of the patients or employees as the General suggested, standing in front of cars and with a keypad to block patient and employee access to the garage, photographing and filming into patient and employee cars.

* * *

ATTORNEY KEATING: Thank you, Chairman. Members of the Committee, I've been on your side of this issue sitting at that side like you just said. Also for the record, I'm District Attorney Bill Keating from Norfolk County.

* * *

A lot of the things we do in our office, a lot of the things we try and resolve through the courts, really are preventative in nature. We try and really calm things down and not have things escalate to a violent situation.

The original bill was compromised and as a result, I think, after having the ability to look at how it functions, and I have a clinic that's in part of Norfolk County, I've seen a couple of things.

First, it was a clinic that's now closed but one, the buffer zone, even on the limited basis, was of some assistance in trying to keep a secure and peaceful situation from strong feelings on both sides at bay.

* * *

So the concept of providing a buffer zone is something that does prevent the possibility of violence and strong feelings on both sides to escalate, and that's something that we should all be aware of.

* * *

SENATOR BREWER: Thank you, Mr. Chairman and to all of you, it's like deja vu all over again to me, because I was on this Committee when we vetted this thing this the last time, quite honestly. But the logic continues, and that is, this bill was not referred to the Department of Public Health, even though we talk about reproductive health today. It was referred to the Committee on Public Safety.

Half the distance from home plate to the pitcher's mound is 35 feet, quite honestly. It's not a long distance. We have the Attorney General, the distinguished Attorney General. We have the Captain of the Police Department, Undersecretary of Public Safety here, the District Attorney here today. I'm sure there are many district attorneys right behind you that would be here as well.

This is about public safety. The most enormously troubling decision that a woman has to make, and it is protected. Whether people like it or not, it's protected by the United States Supreme Court, and to allow in the interest of public safety—not any person, whether they're pro-life or pro-choice—to me it's about public safety.

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[SEN. BARRIOS:] So I don't want you to misinterpret my question as critical, but what I would like to do, since I've got three of the finest lawyers in Massachusetts in front of me, and one of the leading arguments that is made in opposition to this is infringement on First Amendment rights which the federal government, and obviously there's a state equivalent to that. The Attorney General is in charge of enforcing that particular Constitution.

I'm interested in your thoughts on why, because we will have testimony later that will indicate that this is an impermissible infringement. It goes beyond reasonable time, place, and manner restrictions on certain types of speech. And I'm interested in your thoughts, if you have any, specifically as to why that's not the case. Why isn't that permissible?

We clearly have Supreme Court and Supreme Judicial Court precedent for that, but I don't know if you have any observations that go kind of beneath, to particular case about this.

ATTORNEY GENERAL COAKLEY: Just in general, Senator, and believe me, I think all four of us take that right of the First Amendment extremely seriously, and I think Senator Brewer pointed that out.

This is a right that the Supreme Court has consistently said we allow for time, place, and manner restrictions on and for appropriate reasoning. There's always a balance involved, whether it's advertisement to children or it's a political speech. You know, you can't shout fire in a crowded—you remember these rules from first-year law school.

It is important to balance that, and I think it's an appropriate question and I think the Legislature has to weigh this. But when we are looking at the right to speak, which we know has restrictions that can be put on it when it's appropriate, and we know the Supreme Court had found the right to hear, in terms of advertisers, lawyers never used to be able to advertise, Bates versus Arizona. Certainly the court said, there is an audience out there. People have a right to be heard.

But there is no right in either our Constitution or the U.S. Supreme Constitution for a particular person

to be heard by a particular person, and so this is my own little analysis of the Supreme Court rule, but I think it's important to remember that Individual A does not have a right to corner Individual B so that Individual B can hear his or her rights.

Now, having said all that, this is clearly a constitutional time, place, and manner, rule that promotes other goals including the Constitutional rights of those attending the clinic and the rights involved with public safety and fair access, and making sure we won't have car accidents and, frankly, there are a lot of other things the Boston police can comment on but, you know, there's rational, reasonable ways that you can do this balance that does not offend either the U.S. Constitution or our Constitution based upon case law and the analysis behind the reasoning involved in this statute.

ATTORNEY KEATING: And I would complement that with one other perspective, and that's clearly a priority legal issue. The final argument has been added, which I think you were asking for what other knowledge is appropriate.

I also view this in a Constitutional sense as a contest of competing freedoms, freedom of speech and the freedom Constitutionally for a woman's right to choose and right to privacy. So that not only do you have restrictions on public safety versus free speech, but I also think there's a perspective of this as well where you have one freedom and another freedom, and you're trying to work to allow both of those freedoms to be exercised.

CHAIRMAN COSTELLO: A quick question.

UNDERSECRETARY HEFFERNAN: I just wanted to say, I'm the youngest of the three lawyers

here, [indiscernible]. I agree with both points; and I think most importantly, no one has a right to touch anyone within that zone. No one has a right to yell into cars in that zone.

One has to balance, certainly, both rights as the District Attorney mentioned and as the Attorney General mentioned. Public safety has—has a lot to do these days, and I think one of the things that we can do with a law like this is make sure that everyone is protected within the Constitution of both the United States and the state.

So I think that this law will do that. I think it will make it clear what people need to do to exercise their freedom of speech rights, and I urge you to pass it.

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MS. KAPLAN: Hi. My name is Gail Kaplan. I've been escort at—I volunteer at Planned Parenthood.

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I'm here to talk as an escort who is out there and has been out there one Saturday every month for ten years, and I can tell you there's nothing silent about these people.

The few that are silent with signs stand at an appropriate distance and they're not the problem. The problem are the people that move into—practically into the clinic or very close, and I don't have any objection to them shouting. They have a right to shout.

They don't have a right to, in my opinion, get in everyone's way, prevent people from walking into the clinic. The patients that are walking, and the reason we're there is to escort patients into the clinic among all of these protestors.

What I discovered in the last years is that they're getting closer and closer to the front door and the law is very difficult to enforce and I understand that, but they're getting so close that patients are terrified to even walk into the clinic. I've had people ask me, isn't there a back way but, of course there is, but [indiscernible] in the back way. So wherever they go, it's very close.

They not only approach people verbally, they approach them physically. In particular, when it rains, they bring these huge umbrellas and try to knock the escorts out of the way. I've had to—I've nearly fallen several times. They're very abusive to the escorts to distract us from noticing when patients are trying to come into the clinics.

So they hand out brochures. They hand out leaflets inside the buffer zone, and I don't have—I mean I have a problem with their brochures, but I'm not there to make a political statement. I am there to escort patients into the clinic safely.

If a buffer zone law is enforced, if we pass an enforceable buffer zone law, patients, escorts and Planned Parenthood employees could safely walk into the clinic, and believe me, if you would ever go out there on a Saturday morning, they—you can hear them from blocks away, that 35 feet would not prevent them from being heard.

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MR. BANIUKIEWICZ: Good morning, Mr. Chairman. My name is Michael Baniukiewicz. I'm in charge of security for Planned Parenthoods, State of Massachusetts. I'm privileged to be able to see all the Planned Parenthoods from Springfield to Boston, so I

have an idea of what goes on at all of them as far as protestors go.

It's a terrible situation safety-wise for everybody on the street, especially in Boston. Protestors will stop anybody who walks by the building and attempt to counsel them. They place four of their protestors, especially on Saturdays, right on the curbstone of the buffer zone, so when people try to park there to let a patient out, they can't get out because they've got it blocked. So once they come out and they're outside of that buffer zone, they're fair game as far as they're concerned.

I've had it happen to myself where I was standing outside of the clinic, trying to get people into the clinic, and the protestors came right up to me and right into my face inside the buffer zone with their pamphlets saying, see this, this is what you let them do over there, and my statement to her was, you know, I'm working here. I'm in the buffer zone. You have no right to talk to me, to which she'll tell me that, well, you're a employee here so you don't count.

The safety issue is scary. It's not only for the patients and the people that are employed at Planned Parenthood, but the general public walking across the street and even for the protestors themselves, because they tend to try to antagonize everybody coming in. They will look to start a fight, and obviously that's keeping people from entering the building.

And we have to go out there and not only protect our employees, the patients coming in, but also them at times because of the—it's a stressful situation for the people coming in. It's probably the most stressful thing they're ever going to do in their life, and when the significant other is with the patient, they're probably

twice as incensed as anybody there, and to have a person come into their face or into their partner's face and start screaming at them and believe me, they do scream,

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[MS. MCMAHON:] I've been escorting for four years on Commonwealth Ave. and I just wanted to draw the distinction for people who aren't familiar with what goes on between what you might think about as protesting and what the protestors there are actually doing.

They are not saying, you know, don't get an abortion because an abortion is fundamentally wrong. They're saying, don't get an abortion because you're going to die and I'll show you where the ambulance is going to pull up and take you away; or they say things like, don't bother going in the garage, the garage is closed when the garage is, in fact, open.

What they are doing now—an expanded buffer zone is the bare minimum that you could do to help people safely access the clinic. We've seen protestors follow patients when they leave the clinic for up to two and three blocks away, still speaking to them. Those things are another very troubling issue that this won't even get to. This is a bare minimum to help people be able to get in.

And the other thing I would add is they're not targeting only people who are going in as patients to the clinic. They're targeting anyone who walks on the sidewalk, a very busy sidewalk, near a major grocery store and near a university. If they say no, I'm not going to the clinic, they'll say, you know someone, you know someone. Give them this pamphlet, tell them

about how people die here. I see this as a larger community safety issue.

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UNIDENTIFIED LEGISLATOR: Thank you, members of the panel. I probably should have asked this question when the [indiscernible] young lady from Planned Parenthood was testifying, but I was called out of the room.

Does anyone know or can testify to, is there any evidence, anecdotal or otherwise, as to how many women turn away, not because they may have been converted by the sidewalk counseling so-to-speak, but out of fear?

MS. MCMAHON: I can tell you I've had personal experience with several people leaving on a Saturday and by telling them there aren't as many protestors during the week and they opted to make appointments during the week, and that's probably happened—I mean not a massive amount of times, but actually more recently, it's happened two or three times.

REVEREND CRISCIONE: We talked to—

UNIDENTIFIED LEGISLATOR: I'm sorry.

REVEREND CRISCIONE: We talked to two women on the hotline that have had that same experience, of making an appointment on a Saturday and then deciding that they were going to go later in the week because of the difficulty.

UNIDENTIFIED LEGISLATOR: As the chief of security, have you seen that?

MR. BANIUKIEWICZ: I've seen on a weekly basis, I can tell you that at the facility in Chestnut Hill, they probably have at least one or two women who leave because they're afraid to enter the parking lot be-

cause they block the parking lot entranceway, they will block so as not to allow the car to come in, and then we have the other protestors dressed in paraphernalia who will come over to the window with a clipboard and ask them to please sign in before they come through the driveway.

MS. MCMAHON: You can also see people circling in the same car around and around, and every time they pull up, you can see that they want to go out and they'll ask where is the garage and then they never stop.

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ATTORNEY GENERAL'S GUIDANCE LETTER [DKT. NO. 63-3]

[Letterhead of Commonwealth of Massachusetts, Office of the Attorney General]

January 25, 2008
Captain Frank Mancini
Boston Police Department
301 Washington St.
Brighton, MA 02135

Re: Amendment to the Massachusetts Reproductive Health Care Facilities Act (a.k.a. the "Massachusetts Buffer Zone Law")

Dear Captain Mancini:

I am writing to you because there is at least one reproductive health care facility within your jurisdiction to which the state "buffer zone" law applies, or may apply in the future. The law is formally called the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws ch. 266, § 120E½ (the "Act"). The law in its original form took effect on November 10, 2000.[1] The Governor recently signed an emergency amendment to the Act that took effect on November

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[1] In its original form, the Act created a "floating bubble zone" that prohibited persons from approaching within six feet of another person for the purpose of protest, education, or counseling without their consent. This provision applied only within an 18-foot radius of clinic building entrances and exits and clinic driveways and within the 6-foot rectangular corridor from clinic building entrances and exits and clinic driveways to the street. The United States Court of Appeals for the First Circuit upheld the original version of the Act against constitutional challenges in *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) ("*McGuire II*"), and *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) ("*McGuire I*").

13, 2007. A copy of the Act as amended is enclosed with this letter. I am writing to provide guidance regarding the primary provisions of the amended Act.

In general, the amended Act creates fixed "no enter" zones (or "buffer zones") in defined areas near the entrances to reproductive health care facilities if such areas are "clearly marked and posted." The "buffer zones" consist of (1) the area within a 35-foot radius around clinic driveways and clinic building entrances and exits, to the extent such areas fall within a public way, and (2) a rectangular corridor (to the extent it falls on a public way) that extends in parallel lines from the outside boundaries of clinic building entrances or exits, and clinic driveways, to the edge of the street.

Specifically, the amended Act makes it unlawful for any person to "knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility." *Id.*, § 120E½ (b). In addition, the amended Act makes it unlawful for any person to "knowingly [*sic*: *Id.*, § 120E½ (b). In addition, the amended Act makes it unlawful for any person to "knowingly] enter or remain on a public way or sidewalk adjacent to a reproductive health care facility ... within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway." *Id.*[2] These provi-

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[2] The Act applies only to the public way (*i.e.*, public streets and sidewalks). *Id.* There may be sites at which a clinic entrance is set back more than 35 feet from the public street or sidewalk. In that case, the Act would not apply to the area outside of the clinic

sions are in effect only during the clinic's business hours and if the areas described above are "clearly marked and posted." *Id.*, § 120E½ (c). The marking and posting of the areas could be accomplished by marking the areas with painted lines on a street and sidewalk, and by posting a sign advising the public of the applicability of the law.

The amended Act exempts four categories of persons from the above provisions: 1) persons entering or leaving the clinic; 2) employees or agents of the clinic acting within the scope of their employment; 3) law enforcement, ambulance, firefighting, construction, utilities, public works, and other municipal agents acting within the scope of their employment; and 4) persons using the public sidewalk or street right-of-way adjacent to the clinic solely to reach a destination other than the clinic. *Id.*, § 120E½ (b). Identical exemptions in the original Act were upheld by the First Circuit in *McGuire II*, 386 F.3d at 57-59, and *McGuire I*, 260 F.3d at 46-47. With respect to exemption (2), the Court found that it reasonably allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics. *Id.*

The Attorney General provides the following guidance to assist you in applying the four exemptions in the prior paragraph, in locations where the buffer zone is clearly marked and posted, and during a clinic's business hours.

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entrance, as the 35-foot radial area around the entrance falls on private property, not on the public way. At such sites, other laws, such as trespass law, could still apply to the area outside of those clinic entrances. However, the Act would still apply to clinic driveway entrances and exits abutting a public way.

The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.

The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Similarly, the third exemption—for municipal employees or agents acting within the scope of their employment—does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as ex-

pressing their views about abortion or engaging in other partisan speech).

If you have any questions, or need additional information, please feel free to contact me at (617) 727-2200, ext. 2068.

Very truly yours,

/s/ Maura T. Healy

Maura T. Healy
Assistant Attorney General
Chief, Civil Rights Division
Public Protection and Advocacy Bureau

cc: Josh Wall, First Assistant District Attorney, Suffolk County

Amy Ambrick, Office of the Legal Advisor, Boston Police Department

EXCERPTS OF AFFIDAVIT OF MICHAEL T. BANIUKIEWICZ [DKT. NO. 58]

* * *

I am the Owner of Metro Crime Prevention, a private security firm that I founded in 1995.

Metro Crime Prevention provides security services for the Planned Parenthood League of Massachusetts ("PPLM") facilities in Boston, Worcester, and Springfield, and for the Women's Health Services reproductive health care facility in Chestnut Hill. We also provide security services at Fort Devens.

* * *

Metro Crime Prevention has contracted with PPLM since 1998, and with Women's Health Services for approximately the same period of time.

* * *

With the exception of the few patients who park in the PPLM-Boston garage, all patients must enter PPLM-Boston through the front door on Commonwealth Avenue.

* * *

Before the buffer zone law was revised in November 2007, I observed a number of confrontations immediately outside the facility entrance between protestors and people trying to enter the facility. Some of the most heated confrontations I have observed at the clinics my company serves occurred during the period when the 18-foot buffer zone law was in effect, between protestors standing immediately outside of the PPLM-Boston front entrance and people accompanying patients into the facility. These altercations typically arose when protestors addressed patients and their

companions at very close range (closer than six feet), prompting angry reactions from the companions, and leading to heated exchanges. I train the guards to respond to this pattern of conduct by going outside and bringing the patient and the patient's companion inside as quickly as possible. The guard also asks them to fill out a complaint form.

Some protestors at PPLM-Boston are more disruptive than others. Many protestors are quiet and passive. However, while the original law was in effect, I observed that the quieter and more passive protestors would sometimes appear to coordinate their movements within the 18-foot radius in a manner that appeared intended to block passage to the facility. For example, they would space themselves through the area so that patients were forced to pass very close to them on their way to the door.

On one occasion in 2007, I observed a woman named Ruth Schiavone, who frequently protests at PPLM-Boston, standing immediately to the side of the front door. As people entered, she reached out to within a six foot radius and attempted to hand literature to them. I told Ms. Schiavone that she was violating the buffer zone. Ms. Schiavone laughed and said words to the effect, "The judge will throw it out."

Approximately one year ago, over a period of several months at PPLM-Boston, I repeatedly observed one Saturday protestor approach within six feet of patients entering or leaving the facility and yell at them, through a megaphone, statements such as, "You're going to burn in Hell," and "Hitler's death camp all over again." The protestor also addressed PPLM escorts in this fashion.

Since the amended buffer zone law took effect, protestors at PPLM-Boston have continued to display signs, pray, speak and yell to patients and their companions as they enter the building. I still can hear protestors yelling while I am standing inside of the PPLM-Boston building. The general content of the protestors' statements has not changed. Protestors still carry signs and place signs on the sidewalk, although now, they place them on the sidewalk outside of the buffer zone. Protestors park in the public spaces on Commonwealth Avenue that are closest to the facility and lean signs up against their cars. These signs can be seen by people walking along the sidewalk on that side of Commonwealth Avenue. Some of the protestors' signs are visible to me when I stand in the doorway at PPLM-Boston.

Both before and after the amended buffer zone law took effect, protestors at Women's Health Services have displayed signs to and spoken and yelled to almost all woman as they exited their parked cars, walked toward and entered the building. They do not discriminate between women who come to 822 Boylston Street to visit Women's Health Services and women who visit 822 Boylston Street to visit the building's other tenants.

Since the amended buffer zone law took effect, the situation outside of PPLM-Boston has calmed down quite a bit, and there has been a drastic reduction in the number of confrontations between protestors and patients and their companions. Patients and their companions still hear the protestors, view their signs, and become frustrated and upset, but there has not been the same level of tension as there was before the amended law took effect. Because there are fewer people in the path to the door, it is easier for people to en-

ter more quickly. The reduction in the time that it takes for people to get inside seems to have a big impact on the level of frustration and tension outside.

Before the amended buffer zone law took effect, protestors would follow patients from Eastern Mountain Sports at 1047 Commonwealth Avenue to the east, and from Shaw's Market to the west, all the way to the door of PPLM-Boston. As they walked, the protestors would speak to patients and try to hand them literature. When the patients entered the clinic, the protestors would continue to yell after them. Since the amended buffer zone law took effect, protestors have continued to follow patients to the facility from Eastern Mountain Sports to the east, and from Shaw's Market to the west. However, since the amended buffer zone law took effect, the protestors only follow patients to the edge of the buffer zone, rather than all the way to the door.

Prior to November 2007, when the amended law took effect, I often observed two protestors named Gay Guptill and Sheryl Fitzpatrick taking videos or still pictures of patients and cars as they entered the garage in the rear of PPLM-Boston. They would approach within under six feet of entering cars and yell statements such as, "We can help you," and, once the car continued into the garage, "Mommy please don't kill me."

I have observed Guptill and Fitzpatrick standing by the PPLM-Boston garage entrance in Boston Police hats and jerseys. On these occasions, patients have indicated to me that they believed that Guptill and Fitzpatrick were actually Boston Police officers.

Since the amended buffer zone law took effect, Guptill and Fitzpatrick no longer stand right next to the garage entrance. Now, they stand on the other side

of the street from the garage, at the southwest corner of Alcorn and Gardner. They display signs, yell, and take pictures from this corner of the street. They also attempt to follow pedestrians along Alcorn Street toward the front of PPLM-Boston, where the main entrance is located.

In addition to Guptill and Fitzpatrick, I have seen other protestors attempt to follow pedestrians along Alcorn Street toward the front of PPLM-Boston, where the main entrance is located.

At the beginning of 2007, Guptill and Fitzpatrick protested in front of the Women's Health Services facility in Chestnut Hill. I saw Guptill and Fitzpatrick wearing Brookline Police hats and jerseys while standing near the entrance to the parking lot in front of Women's Health Services. Here, too, they carried clipboards and had patients write on clipboards. These patients appeared to be frightened and upset when they learned that Guptill and Fitzpatrick were not police. Patients informed me that they had provided their names, addresses, and telephone numbers in response to Guptill and Fitzpatrick's requests.

Several years ago, at the Worcester PPLM facility, there was a protestor who would stand in the middle of the driveway and try to stop people from proceeding up the driveway to the facility. He yelled statements such as "God's going to get you," or "Maybe someone should have done this to you," when cars approached the driveway. He also trespassed on the private property repeatedly.

Over the years that the original buffer zone law was in effect I made many reports to the police about violations of the buffer zone. My experience was that

the complaints rarely went beyond the initial police report.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF MICHAEL BANIUKIEWICZ [DKT. NO. 137]

* * *

Q. How many people would you estimate are out at the clinic on the second Saturday of the month?

A. It ranges. You could have anywhere from 30 to 50 people.

Q. Let me qualify that. I'm talking about Boston.

A. Yes.

* * *

Q. If I am correct in what you said, I believe you said, correct me if I'm wrong, that having an abortion is one of the most important decisions a woman can make in her whole life; is that right?

A. Yes.

* * *

Q. Do some women who seek an abortion, do they suffer from some type of economic hardship?

A. I think that might be a problem, yes.

Q. Do you think some women may be pressured by their husbands or boyfriends to have an abortion?

A. To some extent.

Q. Yes?

A. Well, yes, but to some extent, because if they really—once again, if they really don't want to be there for that procedure, you know, it's their body. It's what they want to do.

* * *

Q. In your capacity as a security guard, have you ever escorted a patron of Planned Parenthood from some point on a sidewalk into the building?

A. Yes.

Q. And why did you do that?

A. At the time when the barriers were less than what they are right now, the protesters would walk people right up and into the doorway, whether they wanted to listen to them or not, and I have physically gone out and escorted by putting my hands on their backs, the patients, into the door so that they could get into the door, because they were being accosted as such that they couldn't go anywhere.

Q. Have you escorted anybody subsequent to the enactment of a new buffer zone law?

A. No, I haven't. We haven't had to, because the buffer zone gives them the ability to get into the building without being stopped.

Q. What has Planned Parenthood instructed you concerning demonstrators with respect to the buffer zone?

A. Planned Parenthood wants us to abide by the law. Planned Parenthood wants us to be certain that, you know, that both sides of the spectrum are abiding by the buffer zone.

Q. What is your understanding of what that means? What is your understanding of the law with respect to people coming in and out of the buffer zone?

A. What the buffer zone means to me is that there is a 35-foot radius around the door. No transfer of information can be done within that buffer zone. That includes the escorts. The escorts aren't supposed to

speak with the patients as the right-to-life people are not supposed to.

Q. Do you ever see escorts walking inside the zone?

A. Once in a while, but at the point at which they do, the patient is already into the door, so all they've done is gone over and opened the door for them.

Q. Where would these escorts be with relation to the buffer zone, and I'm talking subsequent to the enactment of the new buffer law?

A. Before the new law?

Q. I'm talking subsequent to the new law.

A. Okay. So, within the new law, they also stay outside of the buffer zone area.

Q. The they is?

A. The escorts.

Q. Is it your testimony that you've never observed an escort walk somebody through the buffer zone to the door at Planned Parenthood in Boston?

A. Not that I've ever seen.

* * *

Q. Who requested that buffer zones be placed on the streets?

A. Planned Parenthood.

* * *

Q. Do you know whether a sign is more effective than face-to-face conversation?

A. Face-to-face conversation is always the best if both parties wish to speak to one another.

* * *

Q. Would it be fair to say that Planned Parenthood officials would prefer that pro-life counsellors not come to the clinic?

A. They probably wouldn't, but I'd be out of a job.

Q. In your capacity as a security officer, would you prefer that there be no pro-life counsellors outside the clinics?

A. Yes, I think it would be beneficial for all parties.

Q. Have you ever seen any pro-life literature inside an abortion clinic?

A. No. We specifically won't allow it to come into the building. If somebody wants to keep it, we would make them put it in their vehicle.

Q. When you say we, who are speaking of?

A. I'm speaking of my officers.

Q. Is that also Planned Parenthood's position as far as you know?

A. Yes.

Q. Does Planned Parenthood put out any pro-life information inside the clinic?

A. Pro-life information?

Q. Pro-life information.

A. Not that I know of, no.

Q. Do you ever see any posters inside the clinic that say choose life?

A. No.

Q. Do you ever see any literature or posters inside the clinic that say adoption, not abortion?

A. No. Planned Parenthood, when it comes to any signage in the clinic, never talks about abortion. Signage in the clinic is always about good sexual health.

* * *

Q. Have you ever seen any women come into the clinic who came seeking an abortion who then left without having an abortion?

A. Yes.

Q. How many?

A. I can't give you an exact number, but I know that, you know, there have been times when women have decided that they didn't want to go through with the procedure and have left.

* * *

Q. If I understand your testimony, you're saying that the police are there to make sure that nobody violates the law; is that right?

A. Yes.

* * *

Q. If you're inside the clinic, how can you observe people on the outside?

A. Cameras and windows, we have a window that faces the entryway to the door.

* * *

Q. It's fair to say that you're not always watching what's going on outside on the sidewalk; isn't it?

A. If I'm there, I'm watching.

* * *

Q. How often do you take pro-life literature away from women who come with it into the clinic?

A. If I'm there working a shift, I probably take three or four pieces of material away in the course of a shift, but they are looking to get rid of it. I'll say to them, you know, can I take that, you know, and they're already looking for a place to throw it, so I will take it from them and throw it in the bucket.

Q. If I recall your testimony earlier, you said that pro-life literature is not allowed inside the clinic?

A. It's not in the clinic. It's in the entrance vestibule, and that's where we take it away from them. We obviously can't get it outside the door.

* * *

Q. Do you customarily ask Planned Parenthood patrons how they prefer to be approached by pro-life counsellors?

A. No.

Q. Have you ever asked a patron how they prefer to be approached by pro-life counsellors?

A. No.

Q. And that's in a period of 15 years; is that right?

A. Yes.

Q. So, you don't know how patrons prefer to be approached by pro-life counsellors; is that right?

A. I have no idea.

Q. You do the hiring for your company; is that right?

A. Yes.

Q. Do you conduct interviews?

A. Yes, I do.

Q. Do you conduct interviews over the phone?

A. No.

Q. Why not?

A. It is my feeling that I want to see what a person looks like. My first impression on a person is usually what my gut tells me. I start with the phone call, saying that they're interested in the position.

I make arrangements for them to come into my office for an interview, and my gut tells me when I see the person if I think they're going to be a match for me or not.

Q. And where do you actually conduct the interview?

A. In my office.

Q. And where are you sitting?

A. I'm sitting at my desk.

Q. Where is the interviewee sitting?

A. In the chair right next to me.

Q. How far away is he from you?

A. A couple of feet maybe.

Q. Do you ever interview any of your prospective employees from a distance of 20 feet away?

A. No, because they want to speak to me. They're looking for a job with me, so they want to be close.

Q. Is that the only reason?

A. Yeah.

Q. So, if an individual, perhaps an interviewee had some kind of a phobia and wanted to be interviewed from 30 feet away, you'd conduct the interview from that distance?

A. If a person had a phobia of people and wanted to be 30 feet away, I don't think that they would be a—first of all, I don't think they'd be in my office to conduct the interview, and secondly, I think that would be a number one problem for me not to want to hire them, because people contact is a part of this business.

Q. When you have important matters to discuss and you want to discuss those matters in person, how far away do you stand from that individual?

A. Usually, it's within arm's reach.

Q. If you had something extremely important to say to somebody, would you want to conduct that from ten feet away?

A. If I wanted to conduct that message and they wanted to be there, we could be as close as we wanted to be. I've made my choice to discuss something with you, and you've made your choice to discuss it with me; therefore, there's no need for any boundaries, because we both made that decision.

Q. You and I are engaged in normal conversation; would you agree?

A. Yes.

Q. Voice levels are normal; is that fair?

A. Yes.

Q. We're about four or five feet apart; is that right?

A. Yes.

Q. If I continue to talk to you at the same level and you were 90 feet away from me, could we have an effective conversation?

MR. SALINGER: Are you asking the Witness to walk 90 feet away from you to test that or is this a hypothetical?

MR. DePRIMO: This is a hypothetical.

A. If we were outside and we were this close together, we could certainly hear one another. If you spoke in a voice that you're speaking to me right now outside, I don't care if we were this close together, you're probably not going to get my attention.

Q. Okay, fair enough.

A. Last page, huh? Oh, he's got that look in his eye.

Q. Can you sometimes tell whether or not a person is sincere by looking at their face?

A. Absolutely.

Q. Can you tell if they're sincere by looking in their eyes?

A. Absolutely.

Q. Can you tell if they're sincere by their mannerisms?

A. Absolutely.

Q. When somebody is conversing with you and might put their hand on your shoulder, is that an indication that they're trying to comfort you perhaps?

A. For me personally, if somebody were to put their hand on my shoulder in any type of a conversa-

tion, I might tend to back off a little bit, because I think you're too close into my space.

Q. Do you think some people might view a hand on a shoulder as a gesture of comfort?

A. Yes.

Q. A gesture of empathy?

A. Yes.

Q. A gesture of love?

A. Yes.

* * *

Q. I'd like you to take a look back at what was previously marked as Exhibit Number 2, and you recognize that this is Alcorn Street here on the right?

A. Yes.

Q. And where is the entrance to the clinic in this picture?

A. If you see the grayish-lined area on the picture, that is the overhang to the entrance to the door.

Q. So, the entrance to the door isn't just below this picture; it's kind of to the left of the center; is that right?

A. Yes.

Q. And in this picture, you see a street sign on the left side in the center; do you see that, right by where the gentleman in the blue is standing?

A. Yes.

Q. And there is a space there that is outside of the buffer zone where the man in the tan jacket is standing; right?

A. Yes.

Q. Where is that space relative to the entrance of the door?

A. That space is directly in front of the entrance to the door.

Q. And have you observed people standing in that space?

A. Absolutely.

Q. What have you observed people doing there?

A. They will wait there for a car to stop. They will start talking to the person inside the vehicle through the window.

Q. More generally, not just about that spot in particular, what types of pro-life activities have you observed people engage in outside of the Boston Planned Parenthood clinic?

A. They hold what I call prayer vigils where they say the rosary. They do sing. They have signs tied to say the post. If you look to the right of the picture we're looking at, you called it Exhibit Number 2, there is a side that there are three people standing, and there's a red sign leaning up against the post. That is one of the pro-life signs.

We also have normal or usually the vehicle, the gray vehicle that you see parked right by that sign, that's usually taken by one of the pro-life people's vehicles, and they put signs on the vehicle.

To the left of the picture where the gentleman in the blue is standing with the post, there is another area that they have signs on some of the DPW I believe, they lean one on, excuse me, the fire hydrant, and then

outside the area right across from East Mountain Sports, or no, it's T-Mobile now, they usually have another car parked that they put signs on.

* * *

Q. In this photograph, there are some blue saw horses out; do you see that?

A. Yes.

Q. Is that what you were referencing earlier when you mentioned barriers that the Boston Police Department put up?

A. Yes, on the second Tuesday—I don't know why I say Tuesday. On the second Saturday of the month, we have quite a few people that are there to protest, and the Boston Police put up barriers to keep people inside of the barrier and not out in the middle of the street.

Q. And why are those barriers there?

A. For the protection of the people.

Q. And does it protect them?

A. If they're willing to stay inside of it. We can see from this picture that we have somebody who's standing on the other side of the barrier.

Q. But the barrier is there to protect them from the traffic on Commonwealth Ave.; is that right?

A. Yes.

Q. You also mentioned I believe that you've observed people calling out to those entering the clinic; is that right?

A. Yes.

Q. And how often do you observe that?

A. That happens quite often. Anybody who looks to go into the clinic, people will be calling, you know, come on over here, can I talk to you, come on over here, I need to talk to you.

Q. And where are people standing when they call out to them?

A. Around the outside barrier, around the outside of the buffer zone.

Q. And can you hear these women?

A. I can hear—

Q. Excuse me. Can you hear the people calling out to the women?

A. Yes, you can.

Q. From where can you hear them?

A. Normally, when I'm working there, I'm on the inside behind the window, and I can hear them from there, so I can hear them inside the building.

Q. And do you on occasion step outside the front door?

A. We do if we absolutely have to.

Q. And have you on occasion heard people calling out when you were standing at the front door?

A. Yes.

Q. And are you able to hear people pray?

A. Yes.

Q. And from where can you hear them pray?

A. From inside the building.

* * *

Q. So, for my next questions, we're going to talk about just the Worcester since it opened in its current location on Pleasant Street. How do patients arrive at that clinic?

A. Patients come through the Dewey Street vehicle entrance.

Q. And is that a parking lot?

A. Yes.

* * *

Q. And what types of pro-life activities have you observed at the Worcester Planned Parenthood clinic?

A. The activities are, you know, about the same everywhere. We have people outside trying to hand out information. We have some signs. We have the gentleman that we call the grim reaper who usually walks up and down Pleasant Street. He doesn't talk. He doesn't hand anything out.

He just walks back and forth. We had a major situation one day that really caused a block of traffic. A school had dropped off a busload of children to protest.

Q. And what did the children do?

A. They basically walked around the buffer zone area in the front of the Planned Parenthood. They had songs that they were singing.

Q. Could you hear them singing?

A. I could, because I was outside.

Q. And where were you standing?

A. I was actually in the parking lot. There is a red vehicle parked in this picture, and I was probably one, two, three, four, about five to six parking spaces down

towards the center of the parking lot just before the turn.

Q. And that's the parking lot where patients park when they're headed into the clinic?

A. Yes.

Q. And you could hear the children singing?

A. They could hear inside, too. I know that.

* * *

Q. Have you seen people hand out literature?

A. Yes.

Q. How often do you see that?

A. Whenever somebody is willing to open up their door or their window to accept it.

Q. And how often do you personally observe that happen?

A. When I'm there, you know, you probably see it a few times, and once again I don't want to be specific, because I don't want to be wrong.

Q. You said you're at the Worcester clinic was that two or three times a week?

A. Probably two times a week.

Q. And how long do you usually stay when you're there?

A. A half an hour.

Q. How often do patients bring literature into the Worcester clinic?

A. You probably see it, you know, three or four times.

Q. Three or four times a day?

A. During the AB days or during procedural days is when you'd see it.

Q. And what days are those, if you know?

A. Thursday, Friday, Saturday.

* * *

Q. Have you ever observed people having a conversation with women entering the clinic outside of Worcester?

A. If they stop and they can engage them in conversation, you know, it may just be for a minute or two, but there's never any long conversations.

Q. And when people call out to the people entering the clinic, in your observation, do people seem to notice them?

A. Yes.

Q. How do you know that?

A. You'll see them turn. You really can't help but miss somebody standing on the corner of the street talking to the person inside the car coming in.

Q. You mentioned the grim reaper. How often is he outside the clinic?

A. He's definitely there on Saturdays. I really can't give you, you know, specifically how many times a week he's there.

* * *

Q. Have you ever observed anyone using a microphone or an amplifier out of the Worcester clinic?

A. Not in the Worcester clinic, no.

Q. Let's move on to Springfield, and for the time being I'm talking about just the timeframe again since November 13, 2007, when the new buffer zone law went into effect. How often do you visit the Springfield Planned Parenthood site?

A. Probably once a week, it's a distance, so I don't cover that as much, but the person that I have who works out there is extremely competent.

* * *

Q. How do patients arrive at the Springfield Planned Parenthood clinic?

A. They come into the driveway off to the side of Planned Parenthood. I believe it's Wason Ave.

* * *

Q. As you're pulling into the driveway, can you see the signs?

A. Yes, you can.

Q. And can you read them?

A. Yes, you can.

Q. When you park your car and get out of your car, can you see the signs?

A. You can see the signs, once again if you're 20/20, and you can hear them, you know, calling to you also.

Q. And do they stand in the same locations when they're calling to people to either the right or the left of the buffer zone?

A. Yes.

Q. Can you hear them when you're turning into the parking lot?

A. Yes.

Q. And can you hear them when you park your car?

A. Yes.

Q. Are there any other types of activities you've observed outside this clinic?

A. No. Springfield is—because there is the distance between the entryway and the door, their activities are pretty sedate. They can only do what they can do, you know, at the driveway entrance.

* * *

Q. I'd like to now focus your timeframe before November of 2007, before the current buffer zone law went into effect. How, if at all, do the pro-life activities you observed outside of the Springfield clinic differ than what you just described?

A. Well, they were less contained. They were more liable to come into the property, attempt to go to the cars that people were coming in with, and it made really no difference.

It's a multifaceted medical building, so you may have people coming in, you know, to have their eyes examined, and they would be going to the cars to tell, you know, people that they kill babies in there.

Q. So, the people would walk on the private property—

A. Yes.

Q. —of the building?

A. Yes.

Q. Aside from their stepping onto the private property of the building, what if anything was different about the activities they engaged in on the public sidewalk?

A. They would tend to block the driveway by walking back and forth in front of the entrance.

* * *

A. I've never seen a person that was inside the zone going into the clinic specifically walk over to somebody to take any literature.

* * *

Q. With respect to the Worcester clinic, have you ever seen anybody go into the parking lot off of Dewey Street, park their car, and then walk back to the pro-lifers who are outside the zone on the Dewey Street side to take literature?

A. No.

Q. Have you ever seen anybody, a patron of Planned Parenthood, go into the driveway of the Planned Parenthood on Dewey Street, park their car, and then walk back to the pro-lifers on Dewey Street to engage in conversation?

A. Not that I recall, no. I've seen some of the pro-lifers pull their car into Planned Parenthood and park there and then go out in the street, but.

Q. I believe you testified that on occasion you've seen some pro-life advocates hand out literature to people in vehicles—

A. Yes.

Q. —when people stopped their car and rolled down their window; is that correct?

A. If they were pulling into the parking lot, say if you're making their right into the Dewey Street entrance, and there's somebody standing at the, right at the edge of the buffer zone, you know, they'll try to can I talk to you, can I talk to you, and if somebody should roll down their window to see what they want, you know, they'll try to hand them literature.

Q. How close would they be when they try to hand literature to somebody through a car window?

A. Obviously, it's probably an arm's length away, so they're just at that corner edge of the buffer zone.

* * *

Q. Have you ever seen anybody pull into the parking lot from the Dewey Street exit and then approach the entrance to Planned Parenthood, right; are you following me?

A. Yes.

Q. And then perhaps hear somebody who's calling from the Pleasant Street side of the buffer zone; do you follow me? Have you ever seen anybody—

A. Come in from Dewey Street, enter the building, and hear something from the other side, and go over to the side?

Q. And then walk over to the other side of Pleasant Street?

A. No.

Q. Never?

A. No.

* * *

Q. Is it fair to say that your security officer in Planned Parenthood cannot observe what's going on outside of the driveway while he's inside the building?

A. My officer has cameras that he watches.

Q. Where are those cameras focussed on?

A. Hopefully, they're focussed on the parking lot.

Q. Which parking lot?

A. The main parking lot that Planned Parenthood uses.

Q. I want you to be very careful here and tell me what the main parking lot is. Are you describing the parking lot that's between Wason Avenue and the building housing Planned Parenthood?

A. Yes.

Q. So, there's a camera on that particular parking lot?

A. Yes.

Q. Where else is there a camera?

A. We have cameras around the area. You know, we try to cover—they cover as much of the property as possible as viewable.

Q. When you say the property, tell me what you mean by the property.

A. I'm talking about the Planned Parenthood property building and its surrounding area.

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EXCERPTS OF AFFIDAVIT OF WILLIAM B. EVANS [DKT. NO. 59]

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I am a Captain in the Boston Police Department. I joined the Boston Police in 1980 as a cadet. I became an officer in 1982. I currently serve as Commanding Officer of District 4.

I served as Commanding Officer of District 14 ("D-14") from August 1997 through August 2007. This District contains the Planned Parenthood League of Massachusetts reproductive health care facility at 1055 Commonwealth Avenue in Boston ("PPLM-Boston," or the "facility").

As Commanding Officer of D-14, my duties included enforcement of the original buffer zone law from the time that it took effect in 2000. In this capacity, I trained officers regarding the original buffer zone law. I also served as the police liaison with PPLM-Boston and with protest groups on both sides of the issue. My work frequently required me to visit PPLM-Boston when protests were taking place.

* * *

In my opinion, the original Massachusetts buffer zone law was extremely difficult for police officers to enforce. Because the law allowed protesters to stand however close to facility entrances as they wished, so long as they did not "approach" another person without their consent inside the 18-foot buffer zone, the law forced police officers to play a role similar to that of a basketball referee. The officers had to watch the hands and feet of everyone inside the buffer zone to determine whether they had approached within six feet of anyone else. It was difficult to tell what constituted an

approach, especially when protestors and others crowded the 18-foot area formerly marked around PPLM-Boston's front entrance. For example, it was not clear whether there was an approach every time someone put their hand out toward another person, leaned toward another person, or took a step forward. Sometimes our view was obstructed due to crowding, or due to the positioning of large signs. These conditions made it even more difficult to monitor the area for violations.

There were frequent disturbances, including physical jostling, outside of the facility during the time that I served as D-14 Commander. But partly due to the difficulties with enforcing the original law that I have described, I estimate that my officers did not arrest more than five people. I recall that most of these arrests involved violations of statutes other than the buffer zone law. In addition to these five arrests, there were numerous occasions when a detective issued a court summons on the basis of a police report regarding conduct outside PPLM-Boston. Unfortunately, these arrests and summonses were not sufficient to improve public safety at the facility.

During my time as D-14 Commander, I observed disturbances at the facility that involved pro-choice protestors, pro-life protestors, patients, and patient companions. On approximately ten Saturdays in late 2006 and 2007, a pro-choice group that we called the "Pink Group" was particularly disruptive. They would go into the 18-foot buffer zone and they would push, shove, and step on other people's feet in order to get a good position. When this pro-abortion group was present, the combined presence of the pro- and anti-abortion protestors within the 18-foot zone around the front entrance would effectively block the door.

Protestors on both sides would complain to the police that the other side was violating the law.

Almost every Saturday morning that I visited the facility, I saw protestors standing right by the front door with signs. As long as they were stationary, standing right by the door, they did not violate the original law, because they were not approaching anyone. However, the protestors would position themselves and their signs in such a way that it was difficult for anyone trying to enter or leave the facility to do so without coming into physical contact with protesters, or to do so and avoid having a leaflet held out towards them in very close proximity.

I regularly saw two protestors, Gay Guptill and Sheryl Fitzpatrick, standing within the rear garage entrance buffer zone dressed in Boston Police hats and shirts, notwithstanding that they were not officers or employees of the Boston Police Department. These hats and shirts are widely available for purchase by the public, and therefore we could not enforce laws prohibiting the impersonation of police officers on the basis of how they were dressed.

I often saw Ms. Guptill and Ms. Fitzpatrick, from their position within the buffer zone at the rear garage entrance, yell at people trying to drive into the garage, and videotape the driver, any passengers, and the cars and license plates. They would walk right up to cars to try to talk with the people inside, even when the car was in the 18-foot buffer zone. Sometimes they would approach entering cars at very close proximity—within six feet—and videotape and take still pictures, but not speak.

* * *

EXCERPTS OF AFFIDAVIT OF DETECTIVE ARTHUR O'CONNELL [DKT. NO. 64]

* * *

I am a Detective with the Boston Police Department in District 14, which includes the Allston-Brighton area. I have been with the Boston Police Department for 38 years. I have been a detective for 28 years.

The Planned Parenthood League of Massachusetts reproductive health care facility (the "clinic") is located within District 14. For the last seven years, I have served as the police liaison for the clinic.

As the police liaison for the clinic, I investigate every report made to the Boston Police from the clinic address, 1055 Commonwealth Avenue. I am called on to investigate about two or three reports each month. In addition, I usually visit the clinic on the second Saturday of each month, which is the day of the month when the largest protests take place. I visit the clinic on other occasions as well, including when we anticipate an unusually large protest.

* * *

Since the amended buffer zone law took effect, protestors have continued to come to the clinic and to express their viewpoints on the streets and sidewalks outside.

I have observed as many as 30 to 40 protestors at the clinic on the second Saturday of the month. I have observed that the numbers of protestors who come to the clinic on the second Saturday of each month has remained constant or possibly even increased since the law was amended.

Before the amended buffer zone law took effect, it was very difficult for the police to enforce the law. It was very difficult for the police to determine when the law was being violated. We had to act as referees between the protestors and the patients. At the same time, we had to try very hard to avoid coming into physical contact with the protestors.

Since the amended buffer zone law took effect, the atmosphere outside of the clinic has been much more orderly. There have been fewer confrontations between protestors and people walking to the clinic. For the most part, people outside of the clinic have observed the new buffer zone. The rule under the amended law is much clearer for everyone involved, including the police. The fixed zone makes it possible for us to be sure when the law is being violated.

Since the amended buffer zone law took effect, protestors have continued to speak, shout, yell, pray, sing, and offer literature outside of PPLM-Boston. Some protestors speak into amplification devices. Protestors stand on the sidewalk along Commonwealth Avenue on the same block where PPLM-Boston is located, including on the corner of Alcorn Street and Commonwealth Avenue, in front of the main doorway to the PPLM-Boston building, and to the east of the front entrance. Protestors continue to display signs both by holding them and by attaching them to street signs along Commonwealth Avenue.

Protestors continue to have close contact with patients and others approaching the clinic. Before the amended buffer zone law took effect, protestors would follow patients and others along Commonwealth Avenue towards the clinic, speaking with them and attempting to give them literature. Since the amended

buffer zone law took effect, I have continued to see protestors follow patients along Commonwealth Avenue, although now they stop following them at the buffer zone line. They continue to communicate verbally to the protestors from outside of the buffer zone once the protestors have entered into the buffer zone.

* * *

Both before and after the amended buffer zone law took effect, I have seen protestors follow patients and their companions up Alcorn Street toward the clinic entrance. The protestors are often within a couple of feet of the people who they are following. Both before and after the amended buffer zone law took effect, I have observed the male companions of the patients enter into verbal confrontations with the protestors as they walk up Alcorn Street. Since the amended buffer zone law took effect, the confrontations have been limited to the area outside of the buffer zone, because the protestors stop following the couples when they reach the buffer zone.

* * *

The Boston Police Department's policy in enforcing the buffer zone law is first to warn any individuals who appear to be in violation of the law, and explain what they must do to comply with the law. If any disputes arise, we attempt to mediate them and resolve them amicably. We will not arrest anyone for violating the buffer zone law unless they persist in violating the law after being warned. This approach to enforcing the law has not changed since the law was revised in November 2007.

* * *

The Boston Police Department has not arrested anyone for violating the amended buffer zone statute.

We have not attempted to have charges issued against anyone, either. The officers have given a number of warnings to protestors. If there are violations by people at the clinic who are not protestors, such as employees, the officers will give warnings to them as well.

Since the amended buffer zone law took effect, protestors have asked me whether they are permitted to walk through the buffer zone on their way to some other location. I told these protestors that they are allowed to walk through if they are not doing so for the purpose of protesting inside the buffer zone.

I have reviewed the January 25, 2008 letter from the Office of the Attorney General to Captain Frank Mancini of the Boston Police Department (the "Letter"), which provides guidance regarding enforcement of the amended buffer zone law. I am following the interpretation of the amended buffer zone law that is provided in the Letter.

* * *

EXCERPTS OF AFFIDAVIT OF NICHOLAS P. PARAS [DKT. NO. 65]

* * *

I am employed as an Investigator with the Attorney General's Office of Massachusetts ("AGO"). I have been an Investigator with the AGO since 2003. As part of my duties I assist with the AGO's investigation into and defense of the above-captioned matter.

* * *

During my December 8, 2007 visit to PPLM-Boston and the surrounds, I observed the following, as I detail below and in the attached photographs I took that day:

a. several protestors at the corner of Alcorn St. and Gardner St., one of whom was holding a large sign. *See* Exhibit F.

b. a protestor standing on the Commonwealth Ave. sidewalk near the curb immediately in front of PPLM-Boston's front entrance and outside of the buffer zone markings, holding a large sign. *See* Exhibit G.

c. a group of approximately 15 protestors on the Commonwealth Ave. sidewalk in a penned-in area in front of PPLM, immediately outside of the buffer zone markings and near the front entrance, holding large signs and a large crucifix and chanting prayers and singing songs. *See* Exhibit H.

d. approximately 10 additional protestors on the Commonwealth Ave. sidewalk in front of PPLM outside of the buffer zone markings on the building side of the sidewalk, one holding a large sign. *See* Exhibit I.

e. approximately half a dozen people and uniformed police officers milling about in the street directly in front of PPLM-Boston's entrance. *See* Exhibit G.

f. a protestor standing on the Commonwealth Ave. sidewalk on the western corner with Alcorn St. (in front of Shaw's Supermarket) holding a large sign. *See* Exhibit J.

g. while I stood on the Alcorn St. sidewalk near the western corner with Commonwealth Ave. (to the side of Shaw's Supermarket), the chanting of the group of protestors in the penned-in area and the remarks of individual protestors located on the Commonwealth Ave. sidewalk in front of PPLM-Boston (who were approximately 40-50 feet away from me) were audible to me.

* * *

EXCERPTS OF DECLARATION OF ELEANOR MCCULLEN [DKT. NO. 139]

I am 74 years old. I am resident of Chestnut Hill, Massachusetts. I have light brown/blondish hair. I am 5 feet, 1 inch tall. My body-type can be described as "plump." I am a mother and grandmother.

I oppose the practice of abortion because my religious and moral beliefs convince me that induced abortion is the deliberate destruction of innocent human life. I believe that women generally do not want to have abortions, but often feel forced by boyfriends, parents, employers, and other social and economic pressures to have an abortion. I believe that it is important to let these women know that there is help available for them in their time of need.

I have never observed a woman enter Planned Parenthood with a joyful countenance. Most women I have observed appeared to be sad or coldly resolute.

* * *

For the past 11 years I have provided information to persons entering or passing by the Planned Parenthood abortion facility at 1055 Commonwealth Avenue, Boston (hereafter, "clinic"). The clinic is located at the comer of Commonwealth Avenue and Alcorn Street. The front entrance to the clinic is located directly off a 25-foot wide public sidewalk through a recessed walkway approximately 10 feet long. Men and women entering the front of this facility must walk across the public sidewalk to do so.

* * *

My usual practice is to go to the clinic on Tuesday and Wednesday mornings, from 7 a.m. to 11 a.m. Sometimes I sidewalk counsel by myself. Even when other counselors are present, I still try to make myself available to talk to every incoming woman because sometimes I can be more effective at connecting with a woman than other counselors.

When at Planned Parenthood I peacefully attempt to persuade men and women not to abort their babies by providing information to help them make an informed decision. I offer practical help and educational materials as well as referral information to those entering and exiting the front of the clinic. On numerous occasions women seeking abortion changed their minds as a result of the information and counseling I provided.

I do not protest at the clinic. I provide information, counseling, and whatever help I can offer, including financial help. Over the past 5 years my husband, Joseph T. McCullen, Jr., and I have spent over $50,000 of our own money to pay for baby showers, living quarters, furniture, household items, heating oil, electricity, water, telephone, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else was needed by a woman who chose to give birth rather than abort her baby. It is impossible to make women aware of the financial help I can provide without close personal contact and an opportunity for confidential discussion.

My intended audience is mothers and fathers who are confused or dismayed by their pregnancies and seek to abort their child as a way to quickly resolve their self-perceived dilemma. My primary focus is the emotional and physical well-being of the mother.

Most women that I speak with tell me they do not want an abortion but feel they have no viable alterna-

tive. After speaking with me a short time, many women will voluntarily step into my car for further counseling.

Several women coming out of the clinic immediately after undergoing an abortion have commented to me that they regretted aborting their child. They put their head on my shoulder and sob, saying, "I can't believe I did it." Witnessing the genuine sorrow expressed by these women strengthens my resolve to provide information and counseling to women before an abortion takes place.

My customary manner of expression is close personal communication, in a normal conversational tone, with a kind, gentle voice, and with eye contact. I have found that eye contact and a smile are very important to put people at ease. I believe that communicating in this manner is the best way to provide information and assistance to women. I believe that speaking in a raised voice, shouting, or yelling is counter-productive.

* * *

Prior to enactment of the zone, my customary routine when counseling or distributing literature was to stand still or walk back and forth on the public sidewalk near the path of passersby close to the recessed walkway leading to the clinic entrance. This area is now squarely inside the zone. I always tried to speak to people at a normal conversational level, and from a normal conversational distance of no more than six to eight feet, so as not to alarm or make them uncomfortable. If a person indicated she was willing to speak with me I would move closer but no more than within one or two feet. It was my experience that, unless my proffer of literature was placed near their hands, most passersby would not make an effort to take it.

Since the buffer law took effect, it's been harder for me to engage in close personal communication, at a normal conversational level, with a kind, gentle voice and with eye contact. In some cases, this means I am completely unable to convey my message. In others, it means my message must be delivered faster, louder, and with different content than I prefer.

There are times when I see a woman walking on Commonwealth Avenue who is approaching the clinic from the side of the zone opposite where I'm standing. Often I cannot get around the zone in time to begin a conversation with her, or to place literature near her hands.

There are times when I am unable to reach persons who walk up Alcorn Street and enter the front door of the clinic because I am on the eastern side of the zone. First, I cannot even see someone walking up Alcorn Street when I'm on the eastern side of the buffer zone. Second, once the person turns the corner onto Commonwealth Avenue, the person is already in the zone and headed for the door. There is no way I can move around the zone quickly enough to begin a conversation with this person or place literature near the person's hands.

When I am able to reach a person walking toward the clinic, I walk along beside her/him and speak at a conversational level. But, as we approach the buffer zone, I am forced to stop at the line. If the person continues walking and passes the line, I must raise my voice in order for that person to hear me, especially because she/he now has her/his back to me and is walking away from me. The need to raise my voice is often increased not only by the distance, but by traffic and other ambient noise generated on Commonwealth Avenue,

including trains, cars, trucks, motorcycles, trolleys, buses, trash haulers, police and fire sirens, idling vehicles, tourist groups and passersby. This noise makes it difficult for people to hear me, and for me to hear them. The further I am from a listener, the less the response I receive. Noise is not an issue where I am permitted to approach listeners from a conversational distance of six feet or less.

Also, if I want to continue my discussion with a person who has reached the zone, I am forced to ask the person to stop with me on the street and not cross the line, which I believe implies that I am untrustworthy or should be feared. I have found that stopping at the line makes my message less effective or ineffective because I have less time in which to convey it.

Although after 11 years I've become quite adept at identifying my target audience, the buffer law forces me to stand away from the clinic entrance, which makes it challenging to discern whether persons outside the zone are heading for the clinic or elsewhere. When I was permitted to stand close to the entrance, it was far easier to tell with certainty whether a woman or couple was heading into the clinic.

Because the west side of the zone extends into Alcorn Street, I am sometimes must choose between standing in the street to deliver my message, or else shout it from across Alcorn Street. On two occasions, cars turning from Commonwealth Avenue onto Alcorn Street have brushed against me while I was standing at the edge of the buffer zone.

In my experience, the zone makes communicating even more difficult and dangerous when there is bad weather. After heavy snowstorms, there are often large piles of snow at the curb, which makes it more dif-

ficult and more dangerous for me to navigate around the buffer zone. It is also considerably more difficult to identify and begin speaking to my intended audience from a distance in the rain or snow, both because of noise and because people walk faster, use umbrellas, and keep their heads down. When I was permitted to stand closer to the clinic entrance, the weather posed much less of a problem.

As mentioned above, I also distribute literature at the clinic. My literature includes information about alternative sources of help for women who choose not to have an abortion as well as the human gestational process. I sometimes give away Rosaries and provide information on how to pray the Rosary. Some of my literature is in English, some is in Spanish. My literature also includes a card with my home telephone number in case a woman later needs assistance, regardless of whether she has had an abortion or not. True and correct samples of the literature and Rosary I distribute are attached in Exhibits B-1 through B-9.

I frequently receive telephone calls at home from women who want additional help or information, who are calling to thank me after the birth of their baby, or who have had abortions and seek a kind person with whom to discuss their experience. I provide kind, loving support to all of these callers, regardless of the decisions they have made.

Over the years, hundreds of women have accepted my offers of help. Many have given birth to their child instead of aborting.

Since the buffer law took effect in November, 2007, I estimate that there are, on average, 5-6 people each day, or 480-586 people per year (I am there 48 weeks per year), with whom I am unable to speak or distrib-

ute literature because the buffer zone prevents me from making close personal contact with them.

For the people I do reach, my conversations are often shorter, faster, louder, in fewer words, and sometimes in different words, than prior to enactment of the buffer law. I reach far fewer people under the new buffer law than I did under the old previous law.

Nearly every week I observe women and/or their companions come out of the clinic and stand inside the zone within 5 or 10 feet of the recessed entrance's pathway. Some stand idle, some smoke cigarettes, some talk on a cell phone, and some pace back and forth inside the zone. In most instances, I am 15 to 20 feet away from these people. Because I cannot enter the zone, I cannot place my literature near their hands. Rarely do any of these persons come to me when I beckon them to take my literature. Because of the buffer zone, I am not able to make the type of kind, gentle, personal approach that is most effective, or to offer literature in a manner likely to be accepted.

* * *

I do not hold a sign at the clinic. In my experience, holding up a sign is too impersonal and therefore not very effective for me in communicating my message to incoming women. My approach is personal—I can convey love and caring with my eyes, my gentle voice, my smile, and my attitude. In my view, these virtues cannot be conveyed by holding a sign. For the same reason, I would not convey my message over a microphone, loudspeaker, or megaphone, or by shouting. Close personal contact is essential to my ability to convey my message of love, hope, caring, and gentleness.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF ELEANOR MCCULLEN [DKT. NO. 130]

* * *

Q. How do you go about offering help and hope to young ladies outside of the clinic in Boston?

A. Well, I begin by saying good morning, and I could have two different ways. I could—may say: Good morning, may I help you this morning? Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions.

And then if I have a little more time I would say, Perhaps we can talk a little bit before you rush into anything here, let's just talk a couple of minutes, so my voice is just the way I'm saying it now, just I'm there if you have any questions, is there anything I can do for you, there is help available.

Q. Where are you when you initiate these interactions, on the sidewalk usually?

A. Yes, on the sidewalk.

Q. We will look at a few pictures later to pin it down, but I know you are familiar with the area right outside the clinic.

A. Yes.

Q. If one faces the front door of the clinic, Alcorn Street is immediately to the left; is that correct?

A. If you are facing—yes.

Q. Do you often or typically try to stand or position yourself on the other side of Alcorn Street on that

corner near the supermarket or do you go somewhere else?

A. Well, every day is different, and I could be on the other side of Alcorn, you are right, I could be standing in the center in the street facing the entrance, or I could be on the other side of the buffer zone, so there is no particular place that I have. It's wherever I'm standing, and if I see someone approaching, I try to get to them.

Q. How do you decide who to speak to?

A. Let's see. Generally you can pretty much guess who is coming.

Q. To go to the clinic?

A. To go to the clinic. Because you never see anyone smiling or walking quickly. You generally know, this is general of course, you generally see a person, a woman, or two women, or a couple walking slowly, heads are down, little sadness, so I can pretty—I have been doing this 11 years, so I can pretty much detect that, but you can't always be sure, obviously.

Q. Of course.

A. I would say that would have to—that is what I'm looking for, someone that looks sad, I guess, yes.

Q. So from time to time when you say something like, Good morning, may I help you this morning, will people start to speak with you, stop and speak with you?

A. Yes, they will, especially if I say, Can I help you? Their question would be, How can you help me? And then I will have a dialogue with them.

Q. What is the typical dialogue? What will you discuss?

A. After that point?

Q. After that point.

A. Well, I can certainly help you. Tell me why you are here today. I can tell you really don't want to be here, but you met me, and so tell me what is happening in your life, what can I help you with? And they may tell me a couple of things, and I say, Well, you know what I'm thinking, we have a Safe Center. We could go there and we can help you with what you just told me about, and first of all, we will get the pregnancy test to make sure you are pregnant, and then we will hear your story, and we will show you how we can help, and if I get—then many times they will come to the Safe Center.

Q. Many times? How often? How frequently?

A. Well, I'm a grandmother, and I have a personality that they trust me, so I would say—how many times would you say or just—

Q. In a typical month say how often might somebody—

A. I'll say once a week.

Q. Once a week?

A. It could be. It is a conservative—yes.

Q. And obviously some weeks it might be that nobody goes with you and some weeks two, or three, or four might go with you?

A. Yes.

* * *

Q. What is A Woman's Concern?

A. There are four centers and we offer pregnancy help. We offer parenting classes, we offer financial assistance, we help the young women get—if they need a WIC. We try to help with apartments. It's generally pregnancy help, as much as we can do, until they can get on their feet, so they feel, the young couples—the young women feel they have some support, that they are not alone.

We give them that feeling of consolation, and help, and hope so they don't feel like—Wow, I'm not alone. We give them courage.

* * *

Q. When you do manage to have conversations with people, how long might they last there on the sidewalk?

A. Typically I would say two minutes if they stop, if a young lady would stop and say, How can you help? But then if they are very interested, sometimes I can speak 15 minutes or 20 minutes, because I'm trying to assure them that there is help, so that might take a little longer.

Q. How often do you manage to hand literature to someone that they accept?

A. How many pamphlets do I hand out?

Q. Yes.

A. Probably, oh, I'll say, 15 to 20.

Q. In a day?

A. In a morning, yes.

* * *

Q. Do you report to Bill Cotter or others at Operation Rescue when you have had a successful interaction with someone?

A. Yes.

Q. Are you familiar with the Operation Rescue website?

A. I'm not. I don't do the computer.

Q. Do you have any knowledge about what Operation Rescue does with the information that you provide when you have a successful interaction?

A. Well, I think Bill might type it in and send it out as an encouragement to others, yes.

* * *

Q. How many of these pamphlets, the A Woman's Concern pamphlet, do you hand out in a typical morning or week?

A. I would say maybe 15, 15 a day.

Q. And again, just to be clear, this is along the sidewalk outside the Planned Parenthood Clinic in Boston?

A. Yes.

* * *

Q. You have seen Mary hand her pamphlets people on the sidewalk outside of Planned Parenthood in Boston?

A. Yes.

Q. How frequently do you see Mary hand literature there?

A. I would say maybe about the same. I'll say 15.

Q. Fifteen times each morning that she's there?

A. Yes.

* * *

Q. Does anything else come to mind?

A. I also give my telephone number. I have a small card and it has my name, Eleanor, and it has my telephone number, and on the back it has a little message, and so I always give my telephone number.

Q. That is basically a business card?

A. It's a business card, yes. So those would be the three things.

Q. So the card with your name and number and the message, this is something you will give to people outside the clinic in Boston?

A. Yes.

Q. When do you give that to people, when you get to a certain point in a conversation or—

A. No, I actually give it all the time. It's always part of my little pamphlet.

Q. Why do you give people your name and your telephone number?

A. Well, just in case they—they took the information and maybe they didn't look interested in calling me, I mean talking to me, but then they have my number, so they can call me for any particular reason, either—whatever they want to speak about.

Q. Do women, in fact, call from time to time because you gave them your card?

A. Yes, yes.

Q. Describe to me the kind of interactions you typically have if somebody calls you after you have spoken to them on the sidewalk.

A. Well, unfortunately, I have the calls that come in crying, saying I can't believe I didn't listen to you, I went ahead with the abortion, and now I'm depressed, so I get that type of call, which is fine, I'm not judgmental, so I can speak to that particular person.

And then I get the call, yes, I did get your information and yes, I still do need help, and can we still go to your Safe Center? Those would be two, and then I just had a call, they called me, they had my number, I forgot about them, but they just had their baby, and the father called saying, I had to call you and say the baby just came this morning, a baby boy, so I get those happy calls too, so I guess it ranges from sadness, joy, and then still needing help.

Q. The last call you were describing, the one you just got, this was a woman you had spoken to some time ago on the sidewalk?

A. Right, and she had the information but never called for help, and I just forgot about it, and this was a father that called me exuberant, and he said, My wife said you have to call Eleanor and just to tell her that the baby is here, and he said, Thank you. He said, My son is here. So I guess a range of that type of call.

Q. And if you had spoken to a woman on the sidewalk and she calls you sometime thereafter with the number on your card saying she does want help, what do you do then?

A. Well, let's see. I could have her come to my home, we could talk.

Q. Where is your home?

A. It's in Newton, so it's close by. Or I could say, Well, if you would like we could meet at our Safe Center, I'll meet you there.

Q. Where is that located?

A. I would probably meet her either in Dorchester or Revere.

Q. Okay. Whichever is more convenient for her?

A. Yes. And she probably would like the ultrasound, so wherever they are doing ultrasounds that week, which would be either Dorchester or Revere, I would meet her there. I always stay with my mothers to keep them comfortable, so I meet them there or my home and see if they want to take it further, if they want to go further.

Q. You said sometimes women you have spoken to, given your card to, they call you up and say, I have had an abortion, I'm depressed?

A. Mm-hmm.

Q. What do you do in those circumstances?

A. There again I can speak sometimes just on the telephone and/or I say come to my home, and either way, if they are at my home or on the telephone, I speak about the mercy of God, and I tell them I understand you are upset in this right now and, but I pray actually, and I tell them that the Lord doesn't want them to be depressed, that we have to proceed on, so I give them hope in their sadness, in their adversity. I let them know that there is mercy and forgiveness, and now proceed, don't get stuck in your depression. That would be generally what I would say.

Q. You said you pray; do you pray with them, do you pray for them, sometimes—

A. No, I pray with them, because they want to hear that they are okay, they want to know that it's okay, and I assure them of that at that point.

* * *

Q. How often in a typical day do you hand out one of these Spanish language cards?

A. Not often. Maybe I'll say once a week, maybe—I'll say once a week.

* * *

Q. Could you, in your own words, describe what you are trying to accomplish with your work outside the Planned Parenthood Clinic in Boston?

A. Well, I'm trying to, first of all, help the women. I'm there for the women first.

Q. Primarily—

A. Primarily for the woman first.

Q. Primarily for pregnant women?

A. Yes, I'm there for pregnant women that are scared, and they feel that abortion is the answer for their particular situation, and they are there because they are a by-product of this society, and as I said a minute ago, they are frightened, for various reasons they find themselves in front of Planned Parenthood, and in my 11 years of working there, I have never met anyone after we offer help that really wanted to go ahead with the abortion.

So I'm there to stop the woman, ask her just to wait, show her that there is help, that she doesn't have to be afraid, and as I said earlier, I try to put my arms around her with love and gently guide her and tell her how we can help her, so she is my primary concern, because I also worked with women who have had abortion

and I know how difficult that is, so I'm trying to help her as she is making her decision. This is huge, so I'm there primarily to offer hope and help to the woman.

Q. Are you primarily trying to speak with women who are going to Planned Parenthood to consider having an abortion as opposed to women who are going to Planned Parenthood for some other service or care?

A. Definitely. I know Planned Parenthood does

* * *

Q. From time to time do you succeed in persuading a woman who is going to Planned Parenthood not to have an abortion and instead give birth to their child?

A. Yes.

Q. How many times do you think that has happened in the past year?

A. In the past year?

Q. Yes.

A. As you mentioned earlier—I don't keep a record. I don't really know.

Q. What is your best memory?

A. You want me to give a conservative answer?

Q. Yes, based on your best memory.

A. I would say—in a year I would say 25.

Q. So, for example, since November 2007 it has been two and a half years?

A. I would say 25 conservatively speaking. As I said a minute ago, I really don't know, but if you would like me to give you an idea, I would say 25 a year.

Q. And so sort of on average once every other week. So, of course, it doesn't happen with that regularity?

A. Something like that.

Q. Something like that, okay. So since November of 2007, two and a half times 25, that is maybe between 60 and 65 roughly. Is that a fair estimate do you think of the number of women during that time you have convinced through your communications outside Planned Parenthood not to—

A. This is after the buffer zone went into effect?

Q. Yes.

A. Yes.

Q. 60 or more?

A. I will say yes.

Q. Women that you have spoken with and helped convince not to have an abortion?

A. Yes, but if we are going with 20 a year, say 20, so it been 7, 8, 9, 10, so it would be a little more than 60. How are you arriving at the 60?

Q. Good point. I said two and a half; it's really three and a half, isn't it? My math is bad.

A. So a little more, give or take.

Q. So it's 25 a year and it's three and a half years since November of 2007; we are talking something more like 80 or more women?

A. Yes.

Q. And you have accomplished this primarily by standing on the sidewalk outside the clinic and offering to speak with people and giving them literature?

A. Yes.

* * *

Q. What do you recall observing when you went to the clinic on the second Saturday of the month?

A. The people would be gathered in prayer, perhaps there would be two or three people speaking to women and men, and then also on the Saturday they have—Planned Parenthood has the escorts, and I've noticed they would be taking the young women and men in, they escort them into the building.

Q. When you are outside the clinic on a typical Tuesday or Wednesday morning, are there escorts there as well?

A. No.

Q. So focusing again on the period for the past three and a half years since November 2007, have you ever seen anyone outside the clinic engaged in expressive activities other than prayer?

A. Yes.

Q. Tell me what you have observed?

A. Well, occasionally somebody will come thinking they are helping, and they may express their feelings, and it's not helpful perhaps. I've seen that.

Q. What have you seen? Tell me in more detail.

A. Well, perhaps someone is getting too emotional about the situation here in front of Planned Parenthood and they may be counterproductive as far as their help is concerned.

Q. What is it that they are doing that you fear might be counterproductive?

A. They may be talking too loudly, they probably—pretty much that is what it is, talking just very loud and disruptive actually, but yes.

Q. So the times where you have observed this, what kinds of things have these people said too loudly that you felt might be counterproductive?

A. I don't know, but I know that it's a little bit over the top.

Q. Are they speaking on the subject of abortion?

A. Yes.

Q. And you know that they are speaking in opposition to women having an abortion?

A. Yes.

Q. Where on the sidewalk have you observed people engage in that sort of conduct?

A. Probably right in front of the building, outside, of course, the zone.

* * *

Q. Are you aware of anyone other than you and Mary O'Donnell and Bill Cotter who try to engage in counseling on the sidewalk outside the Boston clinic?

A. The prayer people, if someone would happen to come up to them, they may say something to them, but that is not their chief purpose to be there, so they may begin to say something simply because the opportunity presented itself, so they can stop their prayer.

Q. Is that something that you have observed from time to time?

A. Yes.

Q. Are you aware of anybody else who, say, on other days of the week goes to the Boston clinic and tries to engage in counseling on the sidewalk?

A. Every once in a while there is a woman by the name of Kathy that will come by.

Q. How do you know Kathy?

A. I don't really know her. She just will walk down sometimes. She is on her way to the gym and she will say, you know, I'll stand here with you for a little while, so she may say something, yes.

Q. How frequently does Kathy stand with you on the sidewalk?

A. She might come every week for three weeks and then we will not see her again for, you know, three months, but when she comes it would be once a week for about an hour and a half, but then, as I say, she would be called undependable.

Q. When she is with you on the sidewalk, what does she do?

A. She speaks sometimes a little over the top, so I have to ask her to be quiet.

Q. What do you mean by that, "a little over the top"?

A. Well, because we are out in the zone, obeying that law, we have to project our voice, and her voice comes over a little too loud, I think, so I've asked her just to be a little more gentle, although that is the situation where we do have to project our voice, even though we are not yelling it sounds as if we are, so I have asked her just to be a little more quiet.

Q. So this is when somebody's walking down the sidewalk and you're reaching out to them and trying to start a conversation, is that when her voice can be a little too loud?

A. Yes, especially if they are walking by and we have lost them because the zone is there, yes, she may go a little bit too much, yes, she may look a little too loud, but she doesn't mean that, but that is where we are at at this point.

Q. When you said just now "if we have lost them because the zone is there," what did you mean by that?

A. If I'm meeting someone and I have said, Good morning, how can I help you this morning, and we are walking now toward the clinic, and the person would say, they would say, Well, how can you help me, and I'm beginning to tell them, and now I get to the buffer zone, now they are continuing to walk, they have not recognized the yellow buffer zone, so I have a choice, I can either say, I can't walk any further with you because of the zone, which isn't always helpful because all of a sudden they look down and they think, Who is this person if she can't go further, so all of a sudden I'm like suspicious, or if I don't say that, if I choose to keep my voice, Well, I can help you at a Safe Center, now my voice is getting higher than I would prefer, because my best attribute is gentleness, and eye contact, and caring, so I can care about a person if they are looking at me like you are and talking in a normal voice like I am here for you, but once they cross the yellow line, I've lost some of my capability of projecting trust and hope, so you are kind of—there is a lose-lose.

If I say, Stop, there is a line here, then they become suspicious of why can't you come across, like who are you, but if I raise my voice, then that comes across as

not caring or maybe not as gentle as I would like to project.

Q. I suppose some women you are speaking with may continue on because they don't want to talk with you, right?

A. Yes, they continue on because they will say, I have an appointment, and I have lost them right at the yellow line just as I'm beginning to say, We could go to a Safe Center, just wait one day, don't rush, but they are continuing to walk, and they—remember, they have an appointment, and so in just a few seconds, this is a very fragile, delicate kind of a conversation that I'm doing in seconds, so within a second, if they look at their watch, they have an appointment, and I've lost them, and it's heartbreaking, just it's—it's very upsetting to see that they were interested but I had to stop.

ATTY. SALINGER: Are you doing fine or do you want to take a short break?

THE WITNESS: No, I'm fine. You decide yourself, though.

ATTY. SALINGER: I just want to make sure before I plod on.

THE WITNESS: Well, thank you.

ATTY. SALINGER: Let's just take a look at a few photos.

(Exhibit 6 marked for identification.)

Q. Ms. McCullen, the photo marked as Exhibit 6, what does this show?

A. Well, this is the Planned Parenthood building on Commonwealth Avenue.

Q. So Commonwealth Avenue is the wide street at the bottom of the photo; is that right?

A. Yes.

Q. And we can see the Planned Parenthood sign on the left side of the front of this building, right?

A. That's right.

Q. There's the little awning and that is where the entrance is?

* * *

A. The yellow line is the buffer zone.

Q. Are there occasions on which you may—looking at the photograph, are there occasions on which you may stand to the right of that yellow line?

A. Yes.

Q. And are there occasions when, as you are standing to the right of that buffer line, that somebody may be approaching from the opposite side across Alcorn Street?

A. Yes.

Q. Are there occasions where you might identify that person as someone who may be going into the clinic for an abortion?

A. Yes.

Q. What do you do in that situation?

A. Well, I would look to see if there is anyone that could be standing there to perhaps talk to the young couple, and there may not be, because there is a person there, she may be talking to someone else, or maybe there is nobody there. Many times I'm by myself. So what do I do? Well, I have to quickly go from the right

across out into the street, cross Alcorn, and do my best to greet them.

Q. What would this person be doing as you are walking toward him or her?

A. They are walking slowly, getting—trying to go into Planned Parenthood. Slowly may not be the correct word. They park their car and they are on a mission, they are going into Planned Parenthood. So does that answer your question what they are doing? They are walking to the Planned Parenthood.

Q. My question is, In proximity to you, are they walking toward you or are they walking away from you.

A. Well, they are walking toward me.

Q. And as you walk around the buffer zone are you trying to communicate with these folks?

A. Yes, I am, of course, but I perhaps didn't get—I didn't get over there quick enough, so I may have missed them.

Q. What do you mean by that?

A. Well, they're probably already on the sidewalk into the zone again, back into the zone, so I have just missed them just by seconds, but I have missed them.

Q. You have testified earlier when Mr. Salinger asked you a question that you do not walk inside the zone or through the zone; do you recall that?

A. Yes.

Q. Why is that?

A. Well, it's against the law for me to do that.

* * *

Q. How many missed opportunities would you estimate you have had per day because of the buffer zone.

A. Oh, gosh. I will say six, five or six.

Q. Mr. Salinger had asked you why you go out to the clinic, and one of the things that you said, correct me if I'm mischaracterizing your testimony, is that you want to tell women they need not be afraid; is that correct?

A. Yes.

Q. When you said "need not be afraid," what did you mean?

A. Well, when I meet a young couple, when I meet a woman, generally they have been told by their boyfriend to have an abortion or else. Perhaps they have been told by their father, Do not come back to this house if you don't have the abortion. Perhaps they were told by their employer, You cannot work here if you are pregnant.

So they are afraid. They are afraid of their family, they are afraid they are going to lose the boyfriend, they are afraid they are not going to get the job, so they are afraid.

Q. Did you have anything else in mind when you said that they are afraid?

A. When I meet them they are scared, they are afraid. That is what I'm—when I'm saying that, that is what—they are afraid. I'm trying to tell them that this is challenging and I understand their situation, but we are here to help you, and there is help, and we can—I can call your father, I can help you with all of this, so that is what my answer would be.

* * *

Q. How important is it for you to have personal contact?

A. Well, it's everything. The personal contact is everything.

Q. When I say "personal contact," who would you like to have personal contact with?

A. I would like to have a personal contact with the future mother and father that are contemplating abortion.

Q. And how would you define "personal contact"?

A. A friendly smile, a caring person, someone that can help them in this time of crisis, that something—someone that can offer a helping hand.

Q. How important is your demeanor when you are at the clinic?

A. It's extremely important.

Q. Why is that?

A. Well, if you're going to show love and gentleness and help—so that is what you have to project, and it has to come from your heart, and the only way you can do it is speaking as we are speaking now, eye contact, just a building up of a trust, and it has to be pretty close to do that.

Q. What is your ultimate goal when you are at the clinic?

A. My ultimate goal, I guess, would be two, two goals; one, to project caring and to care for the woman, because, as I said earlier, no woman really wants to have an abortion, and, of course, your baby is also extremely important, but I'm there first for the woman and, of course, a child being born. I've been to the hos-

pital many times. They call me, they say, Come, the baby is coming. There is nothing more beautiful than to see the baby come and to follow them on their whole journey. I hold their hand for the eight or nine months they have left. I'm always with them. So there is nothing more beautiful. So the birth of the baby, but first the mother. The mother is so important too.

* * *

Q. The buffer zone is on one side of Alcorn Street, but as I think you have already testified, you can stand and talk to people on the sidewalk on the other side of Alcorn Street and be outside the buffer zone, right, in front of the supermarket?

A. Yes.

Q. And, in fact, that is a place where you often do speak with people and hand literature to them; is that right?

A. Yes.

* * *

Q. Mr. Salinger had suggested that you could stand on the sidewalk opposite of the buffer line in front of the Star Market; is that correct? Do you recall that?

A. Yes.

Q. How would that affect your ability to communicate to your target audience if you stood there?

A. It would be virtually impossible. I would have lost all credibility. I can't project my voice. I would have lost a potential help for a mother and a child if I'm over here. It's just—and they are rushing in, they are rushing in.

* * *

Q. This corner of the sidewalk in front of the supermarket, not infrequently you stand there and try to start conversations with women or couples, right?

A. Yes.

Q. And not infrequently you, in fact, have conversation there, right?

A. Yes.

Q. It's a location where you not infrequently hand literature to people and they take it from you, right?

A. Yes.

Q. When you said it's virtually impossible to stand and communicate with people, that is not right, is it?

A. Well, the point is, if I'm on that side I'm distributing, but then we could play the game, I see somebody coming up the other way on Commonwealth Avenue, and then I'm rushing to that side, if I'm going back and forth.

Q. Is this one of the reasons why you try to go with Mary O'Donnell, so she could be on one side of the zone and you could be on the other?

A. That is true, but many times Mary is also speaking to someone else, so I'm the only one that can go, or perhaps she's going to have a break and still I'm the only one that is looking at both angles, both places on the sidewalk.

Q. There are quite few sidewalk counselors who go outside the clinic in addition to you and Mary, right?

A. There are other people that come, but mostly they are the prayer people. A lot of people don't like to speak up because they are more shy or they like prayer, which prayer is powerful.

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EXCERPTS OF DECLARATION OF ERIC CADIN [DKT. NO. 140]

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I am 30 years-old and a resident of Brighton, Massachusetts. I am a seminary student at St. John's Seminary. I am scheduled to be ordained as a Catholic priest on June 23, 2012. I was formerly a pre-med student at Harvard University.

* * *

For the past six years I have provided information to persons entering or passing by the Planned Parenthood abortion facility at 1055 Commonwealth Avenue, Boston (hereafter, "clinic"). The clinic is located at the comer of Commonwealth A venue and Alcorn Street. The front entrance to the clinic is located directly off a 25-foot wide public sidewalk through a recessed walkway approximately 10 feet long. Men and women entering the front of this facility must walk across the public sidewalk to do so.

Police are sometimes present at the clinic when I am there, and have been for the past six years.

* * *

When at Planned Parenthood I peacefully attempt to persuade men and women not to abort their babies by helping them make an informed decision. I offer practical help and educational materials as well as referral information to those entering and exiting the clinic. On several occasions in the past six years women seeking abortion changed their minds as a result of the information and counseling I provided. My experience has taught me that counseling is most effective when

offered in a normal conversational tone and in a friendly and calm demeanor. I find it important to stand near the path of pedestrians. My primary audience is persons seeking abortions.

I believe that speaking in a raised voice, shouting, or yelling is counterproductive. When at the clinic I do not protest. Rather, I provide information and counseling.

My message is different from most other prolife counselors at the clinic because I am young and male, and most others are middle-aged or elderly and female. Many of the people patronizing Planned Parenthood are in my age group and, like me, are of limited financial means. For this reason, I am able to empathize with their situation in a way different from someone who may be comfortably middle-age or retired.

Often people I talk with indicate surprise that a young male is offering prolife counseling on a public sidewalk. Before entering the seminary, I was involved in many romantic relationships with the opposite sex, and therefore I am familiar with the dynamics and pressures of non-marital male/female relationships. Most prolife counselors that I know are married with children. I also wear my clerical collar so people will know that I bring a religious perspective to the conversation.

I especially relate well to young men who patronize the clinic, many of whom appear bewildered or scared. On many occasions, I observed prolife counselors—especially older women—intimidated by young, muscular males who are tattooed, particularly when these young men direct profanity at them. I am not afraid and will not hesitate to speak with these young men. It is not unusual for these scary-looking young men to

confide in me once I engage them in normal conversation.

Every time I go to the clinic I see patrons or their companions standing idle inside the buffer zone. On Saturdays, police are often present on the public ways adjacent to the clinic. I have never seen a police officer take action against any of these persons.

I especially like to speak with persons who earlier had accompanied women seeking abortion when they come out to the front of the clinic to smoke cigarettes, make phone calls, talk, or just hang out. These people usually stand or lean against the building toward Alcorn Street within 5-10 feet of the recessed doorway. If I'm standing at the edge of the buffer on Alcorn Street, these persons are usually 15-20 feet away from me. If I'm standing on the opposite side of the buffer zone, these people are 35-40 feet away from me.

Prior to enactment of the buffer law, my customary routine when counseling or distributing literature was to stand stationary on the public sidewalk near the path of passersby close to the recessed walkway leading to the clinic entrance. I always tried to speak to people in a normal conversational tone so as not to alarm or make them uncomfortable. When a person indicated he/she was willing to speak with me, I would move closer but no more than within one or two feet. It was my personal experience that, unless my proffer of literature was placed near their hands, most passersby would not make the effort to take it. This area is now squarely inside the zone.

Prior to enactment of the buffer law, I did not shout although there were times I had to raise my voice in order to be heard over cars, trucks, buses, motorcycles, trains, idling vehicles, Planned Parenthood es-

corts, and other ambient noise. I also found that eye contact and a smile are very important to put people at ease. In order to effectively communicate orally, I always tried to speak from a conversational distance, usually no more than six or eight feet.

Subsequent to enactment of the buffer law, there is still much noise from cars, trucks, buses, motorcycles, trains, and idling vehicles, and I find it extremely difficult to talk with people over a distance of ten feet with all the ambient noise at the clinic.

In my experience, the zone makes communicating even more difficult and dangerous when there is bad weather. After heavy snowstorms, there are often large piles of snow at the curb, which makes it more difficult and more dangerous for me to navigate around the buffer zone. It is also considerably more difficult to identify and begin speaking to my intended audience from a distance in the rain or snow, both because of noise and because people walk faster, use umbrellas, and keep their heads down. When I was permitted to stand closer to the clinic entrance, the weather posed much less of a problem.

Since the buffer law took effect, there have been several instances when clinic patrons entered the marked zone at the clinic from the side opposite where I was standing. I was unable to navigate around the zone before these patrons entered the clinic. I thus was unable to engage them in normal conversation or provide them with educational materials.

Many times when I was standing at the edge of the zone on Alcorn Street, I was directly in the path of moving vehicles making right turns from Commonwealth Avenue. Sometimes occupants of these vehicles honk and yell at me. Sometimes these vehicles are

traveling at a dangerous rate of speed. It is not my preference to stand in the street but it is the closest point to persons standing inside the zone next to the recessed walkway. Many times I observed other persons standing at the edge of the zone in the direct path of moving vehicles.

Since enactment of the buffer law, I repeatedly observed Planned Parenthood "escorts" surround, cluster, walk with, chatter, and/or talk at clinic patrons. I also observed them talk in a manner that appeared designed and intended to prevent clinic patrons from hearing me. I heard escorts say things like, "you don't have to listen to [him, her, them]," or "don't pay any attention to [him, her, them]," or "don't listen to [him, her, them]," or "[he, she, they] is/are the crazy," or "those people are crazy." It was obvious to me that the escorts were referring to pro-life advocates like me when making these statements. Escorts often raised and lowered their arms so as to prevent me from placing literature near the hands of clinic patrons.

I have observed escorts mocking pro-life advocates such as myself. I heard escorts say things like, "abortion is legal," "it's important for women to have a choice," "we have help," or "we'll help you get inside." Escorts are easily identifiable because they always wear blue vests marked with the words, "PLANNED PARENTHOOD ESCORT."

It is extremely difficult for me to win the attention of people approaching the clinic when escorts are in close proximity to them, especially when the escorts surround and talk at them. It is not unusual for me to fail to win their attention entirely.

Since passage of the new buffer law, I also observed clinic escorts standing idle inside the zone. I ob-

served them talking with each other inside the zone, drinking beverages inside the zone, and talking on cell phones inside the zone. I recall several occasions where a police officer was present but did nothing. My attempts at personal conversation and distributing literature are much less effective when escorts are inside the zone.

In almost every instance when a person appears headed toward the clinic, one or more escorts approach the person outside the zone and then walk with the person past the buffer line and up to the door of the clinic. As they walk along, the escorts continue talking with or at the person so as to direct their attention away from me and prevent them from listening to me. When I am able to walk alongside and talk with a person, I must stop at the buffer line while the escort continues to walk with that person all the way to the door. It is extremely difficult for me to win the attention of clinic patrons when escorts are guiding them all the way to the door.

While walking along with clinic patrons, they sometimes tell me that I may not cross the buffer line or that I have to stop at the buffer line. This indicates to me that they have preconceived notions about me or prejudice against me even though they have never met or previously spoken to me.

It is extremely difficult for me to identify, from a distance of 35 feet or more, persons intending to enter the clinic because people often use the public sidewalk to go to other destinations. The zone thus often makes it very difficult for me to identify and converse with my intended audience before they enter the clinic. It is essential that men and women receive information and counseling before an abortion is performed.

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EXCERPTS OF DEPOSITION TESTIMONY OF ERIC CADIN [DKT. NO. 131]

* * *

Q. I gather that periodically you spend time outside the Planned Parenthood Clinic in Boston; is that correct?

A. Yes.

Q. How often do you go there?

A. Now it is approximately once a month or—once or twice a month. In the past—I'm in school now, so that is why it's more limited. When class is in session it would generally be about once a week.

* * *

Q. In a typical morning, if you are there on the sidewalk for three or three and a half hours, how many different women or couples will you end up having conversation with?

A. I would say more than 10. I don't know a precise number.

* * *

What else can you remember happening when you were there with the larger groups on a Saturday? In other words, what were other people doing? You described what you were doing there.

A. I would be—so I was praying. Some people would be trying to counsel the women and talk to the women and men who were going in. There would be escorts, so I guess they would be employees of Planned Parenthood or marked as Planned Parenthood escorts who would identify, in the same way we would, people who they think were going in and would go and literally

escort them from wherever they picked them up to prevent them from hearing or engaging with any of us.

They would either literally stand in the way of what we were doing and follow that person all the way to the door, or would start speaking with that person while we were to sort of drown out what we were saying, or to say that what we were doing, that we shouldn't be listened to, we are crazy, we are just pro life fanatics, or any number of things and to impede and just to block either our message or our ability to even engage them.

* * *

Q. Previously you liked to stand closer to the actual entranceway; is that correct?

A. Yes.

Q. From that location you could try to hand literature to just anybody going in?

A. Yes, and most people would take the literature then.

Q. Now that you are remaining outside the buffer zone?

A. It's very difficult to even hand out the literature because, one, when I was able to stand inside what is the buffer zone now, it was far easier to see who was going in. Now you don't know as easily as you could before and so now the—and if I'm on one side I can't—by the time I would get to the other side, they would have, in a lot of cases, already gotten into the buffer zone, so it is not possible to give them to them, and then on the left side, the Alcorn Street side in front of—basically in front of the Star Market, there is—I mean, there is a lot of people, some going into Star Market, some going to

Planned Parenthood, so it's just harder to be able to give them to the people who would benefit.

* * *

Q. In having those conversations, what is your goal? What are you trying to accomplish?

A. I want to, one, let them know that there is all sorts of help available for them and that I and the people at these centers, and anyone else who is present at these things, really does care about them and wants to help them, and help their child, and help their situation, that this is not the only choice that they have, which a lot feel.

Q. Are you hoping to encourage women to visit a Woman's Concern instead of going to Planned Parenthood?

A. If they wanted and need the services that they had, certainly. If they didn't need these particular services or want these particular services, I don't force them and wouldn't, but this is a particular place that is just an example of a place that has very real help.

Q. For you, what is a successful interaction with a woman outside the clinic?

A. Well, at the minimum, that they can receive the information that I have, that they know in a way that a lot of them didn't know before more of a fuller picture of their choices available to them and the options available to them, so as a start that would be—that there are people who do care about them and that there is real help; that would be a minimum.

Q. Just to pause on the minimum, if a woman listens to you, speaks to you, takes literature from you, are you achieving that minimum level of success do you think?

A. Well, not as I would have, not as I was before, no, because there is—like if I'm there by myself, I cannot be on both sides at the same time and so I can't engage—if I am on the left side in front of Star Market and someone is coming from the right, it's just not really possible for me to get over there to be able to even do this minimum amount.

Q. So let me—

A. Because what is important is, more than like a sign or anything, is actually engaging and having a real conversation, letting them know—if it's through me, great—that there are real people who can help them and want to help them, and that is why, even more than handing the thing, it's important to be able to speak to them in a human way, because there really is a personal element that, you know, is not just a slogan, it's really help.

* * *

Q. And you have already said, I guess a couple of times, sorry about that, that in a typical morning you are able to succeed in having real conversation with 10 or more women; is that fair?

A. Yes. I mean real, some kind of real engagement, yes.

* * *

Q. Have you been able in the past three and a half years to guide women who you meet outside the clinic in Boston to, as you say, help and support that is not from Planned Parenthood?

A. Yes.

* * *

Q. Since November of 2007, again when the law was changed, how many women have you helped convince not to have an abortion?

A. I can't recall an exact number.

Q. I don't need an exact number, but what is your best estimate based on your memory?

A. Honestly I can't think of a number at the moment because I haven't kept track of how many I specifically have helped—or not helped, but convinced otherwise.

Q. Do you think it's at least one woman?

A. Yes.

Q. More than one?

A. Yes.

Q. More than 10?

A. I think so.

* * *

Q. In these various ways how many women are you aware of who, through contacts made outside the clinic in Boston, the Planned Parenthood Clinic, have been given help or support through the group of people you have been talking about?

A. A number?

Q. A vague sense of how many are we talking; three, thirty, a hundred? You know, order of magnitude.

A. I think more than a hundred.

* * *

Q. Again, I know these are hard question to remember, but roughly how many women have you

helped convince go to see folks at A Woman's Concern instead of going into Planned Parenthood?

A. More than five.

Q. When you are outside the clinic, either alone or with Eleanor, have you seen anyone else present at those times engaged in some sort of expressive or communicative activity near the buffer zone?

A. Yes.

Q. Tell me about what you have seen or heard.

A. I've seen people there praying, I've seen people there holding signs, and I've seen people there—I mean, I have mostly seen people there praying.

* * *

Q. Have you seen anybody else near the Boston clinic handing out literature?

A. Yes.

Q. Tell me what you observed in that regard.

A. I've seen one woman who hands out rosaries and some other form of—I don't know which one, it might be this—standing on one side handing it out.

* * *

Q. Eleanor McCullen, what have you seen or heard Eleanor doing outside the Boston clinic?

A. I have seen her talk with the women and I've seen her pray out there. I don't remember if I've seen her hand literature. No, I have, actually.

Q. Have you participated in or heard some conversations that Eleanor has had with women on the sidewalk outside the Boston clinic?

A. Yes.

Q. Do you think she is pretty effective in those conversations?

A. I think she is—you know, she is able to offer her perspective and help when she is able to engage the women.

Q. Is she good at engaging and communicating with the women she is speaking to on the sidewalk?

A. Yes.

Q. Do you think you have gotten good at doing that?

A. I try.

* * *

EXCERPTS OF DECLARATION OF JEAN BLACKBURN ZARRELLA [DKT. NO. 141]

* * *

I am an 85 year-old mother and grandmother. I reside in Lynnfield, Mass.

* * *

I have been providing men and women with information about abortion and abortion alternatives since 1988. I would estimate that, as a direct result of the information and counseling I provided, at least 100 women who came to abortion clinics with the intent to abort left without going inside, or went in and came out shortly thereafter.

* * *

On Saturdays, and some Wednesdays, usually between the hours of 7:00am and 10:00 am, I provide information to persons entering or passing by the clinic.

On Saturdays, I am usually the only prolife counselor between 7:00 and 7:45am. During this time, one or two others may be there setting up signs but I'm the only one looking out for persons entering the clinic.

Because the present buffer law prohibits me from standing near the clinic entrance, and because people may be approaching the clinic from any direction, it is extremely difficult for me to identify and then quickly approach people who are entering the clinic from a direction opposite of where I'm standing outside the zone.

When at the clinic I peacefully attempt to persuade men and women not to abort their babies by helping them make an informed decision. I offer practical help

and educational materials as well as referral information to those entering and exiting the front of the clinic. The materials I offer include why it's important to be pro-life, fetal facts, the dangers associated with abortion, and religious literature that includes a prayer card depicting the Blessed Mother weeping over abortion, and a business card-size handout encouraging Catholics to return to the Church. True and correct samples of this literature are attached in Ex. A-1 through A-5.

My experience has taught me that counseling is most effective when offered at a normal conversational volume level in a friendly and gentle manner, and from a normal conversational distance of no more than six to eight feet. Eye contact is essential for me to show the people I meet that I am sincere and loving. I find it best to stand near the path of pedestrians.

While my interest includes those who approve or perform abortions, my most important intended audience are persons seeking abortions. I do not protest at the clinic. Rather, I provide information and counseling to women about to make an irrevocable choice.

Prior to enactment of the current buffer zone law, my customary routine when counseling or distributing literature was to stand in one place on the public sidewalk near the path of passersby close to the recessed walkway leading to the clinic entrance. I always tried to speak to people in a quiet conversational tone so as not to alarm or make them uncomfortable. If a person indicated he/she was willing to speak with me, I would move closer but no more than within one or two feet. It was my personal experience that, unless my proffer of literature was placed near their hands, most passersby

would not make the effort to take it. This area is now squarely inside the zone.

The zone also makes it difficult to engage in conversation with some persons. Since the buffer law took effect there have been hundreds of occasions when clinic patrons entered the marked zone at the clinic from the side opposite where I was standing. If I position myself on one side of the zone and a person approaches from the other, it is often impossible for me to move around the zone and get to the opposite side before the person enters the zone or even the door of the clinic. Accordingly, I am often unable to reach my intended audience.

As a result of the buffer law, the closest I can get to the entrance is to stand at the edge of the buffer zone line on Alcorn Street with my back toward traffic. Many times I observed vehicles pass close behind me, almost brushing against my clothing. On many occasions, I have nearly been struck by vehicles turning from Commonwealth Avenue onto Alcorn Street. The placement of the buffer line on pavement well into Alcorn Street places me in danger of vehicular traffic. Because the effectiveness of my message depends on close personal contact, I risk my personal safety to stand at the edge of the buffer line. It is this place that affords me the best opportunity to effectively convey my message to my intended audience.

Every Saturday I observe clinic "escorts" on the public ways adjacent to the clinic. These are men and women who wear blue vests that say "Planned Parenthood Escort," approach people who appear to be headed for the clinic, and then quickly usher them to the clinic door. Since the new buffer law took effect, I have repeatedly witnessed clinic escorts surround, clus-

ter, walk with, yell, make noise, chatter, and/or talk loudly as they ushered people to the clinic front door. I heard escorts say things like, "you don't have to listen to [him, her, them]," or "don't pay any attention to [him, her, them]," or "don't listen to [him, her, them]," or "[he, she, they] is/are the crazy," or "those people are crazy." It was obvious to me that escorts were referring to pro-life advocates like me when making these statements.

Since passage of the new buffer law, I also observed clinic escorts standing idle inside the zone. I observed them talking with each other inside the zone, drinking beverages inside the zone, and talking on cell phones inside the zone. I recall one occasion where a police officer was present but did nothing. My attempts at communication are much less effective when escorts are inside the zone because they shield clinic patrons who are inside the zone.

In almost every instance when a person appears headed toward the clinic, one or more escorts approach the person outside the zone and then walk with the person past the buffer line and up to the door of the clinic. As they walk along, the escorts continue talking with or at the person so as to direct their attention away from me and prevent them from listening to me. When I am able to walk alongside and talk with a person, I must stop at the buffer line while the escort continues to walk with that person all the way to the door. Escorts always stand a few inches from me no matter where I stand, and then move in the same direction I move. The escorts are mostly young women who are able to approach a person more quickly than I can.

Nearly every week I observe women and/or their companions come out of the clinic and stand inside the

zone within 3 or 4 feet of the recessed entrance's pathway. Some stand idle, some smoke cigarettes, some talk on a cell phone, and some pace back and forth inside the zone. In most instances, I am 20 feet or more away from these people. Because I cannot enter the zone, I cannot place my literature near their hands. Rarely do any of these persons come to me when I beckon them to take my literature. This is extremely frustrating to me because I have urgent information to give them. In fact, my counseling may literally be the difference between life and death for both the woman and her unborn child. If not foreclosed by the law, I would approach these people and, in a kind, gentle manner, with eye contact and in a normal conversational voice, and offer them help and information. Because of the law, however, I am often forced to deliver this message from a distance in a loud voice, which is considerably less effective.

It is extremely difficult for me to identify, from a distance of 35 feet or more, which persons intend to enter the clinic because people often use the public sidewalk to go to other destinations. The zone thus makes it very difficult for me to identify and communicate to my intended audience outside the zone. It is essential that women seeking abortion know that help is available before they enter the clinic.

* * *

I do not use loudspeakers, microphones, or megaphones. I do not shout unless absolutely necessary. In my experience, these methods are not conducive to conveying my message of kindness, love, hope, and help.

In my experience, the zone makes communicating even more difficult and dangerous when there is bad

weather. After heavy snowstorms, there are often large piles of snow at the curb, which makes it more difficult and more dangerous for me to navigate around the buffer zone. It is also considerably more difficult to identify and begin speaking to my intended audience from a distance in the rain or snow, both because of noise and because people walk faster, use umbrellas, and keep their heads down. When I was permitted to stand close to the clinic entrance, the weather posed much less of a problem.

Commonwealth Avenue is a major thoroughfare. Whenever I'm at the clinic, I hear noise coming from trains, cars, trucks, motorcycles, trolleys, buses, trash haulers, police and fire sirens, and idling vehicles. Tourist groups and passersby often contribute to ambient noise. This noise interferes with my ability to convey my message. The further I am from a listener, the more ambient noise hinders my attempts to communicate. Noise is not an issue where I am permitted to approach listeners from a conversational distance of six feet or less.

* * *

My message is best delivered from a normal conversational distance, in a kind, gentle, loving voice, with eye contact and a smile. The law makes it much more difficult to communicate with my target audience in this manner. In fact, although I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the Act took effect in November, 2007.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF JEAN BLACKBURN ZARRELLA [DKT. NO. 132]

* * *

Q. Do you ever visit the Planned Parenthood clinic on Commonwealth Avenue in Boston?

A. Yes.

Q. How often do you go there?

A. At least once a week.

Q. And when do you go?

A. Saturday morning.

* * *

Q. So a woman stops to talk to you between one and five times a day on an average day.

A. One and four, perhaps.

* * *

Q. But when a woman does stop to speak with you, what do you talk about?

A. I pass them literature and show them what we have to make available to them.

* * *

Q. You said you hand out literature.

A. Uh-huh.

Q. How often do people take the literature that you hand out?

A. I would say—now, these aren't necessarily people going into the abortion mill. But most people take what is offered to them.

Q. Approximately how many pieces of literature do you hand out in a typical day?

A. As I say, these aren't necessarily people going into the abortion mill door, because I can't determine that 35 feet away. But everybody that passes by I offer to them. Perhaps half of them take it.

* * *

Q. In the past year approximately how many times have you helped a woman in deciding to go to A Woman's Concern?

A. I haven't.

Q. Not once in the past year?

A. Not once.

Q. In the last three years?

A. Once.

Q. Once in the last three years?

A. Once, uh-huh.

* * *

Q. Are you there to try to persuade women not to go through with the abortion?

A. Yes, I am.

Q. And have you ever convinced a woman not to go forward with her abortion?

A. Since '88, yes, many. This was prior to the buffer zone, of course.

Q. Since '88 approximately how many, total?

A. About 110.

* * *

Q. So how many women have you convinced not to have an abortion outside of the Planned Parenthood clinic in Boston since November of 2007?

A. None. None that I'm aware.

* * *

Q. When you're there, are there ever any other counselors out there with you?

A. There's some—there's another lady that comes shortly after I arrive, and she has some signs.

Q. What's her name?

A. Ruth.

Q. And where does she stand?

A. She puts up the signs surrounding the buffer zone.

Q. Where does she put up the signs? On the right-hand side? On the left-hand side?

A. Both.

* * *

Q. And what do the signs say?

A. It shows pictures of the baby.

Q. Do any of them have any text on them?

A. Going, going, gone." It shows the baby losing its life.

Q. Any others?

A. "Take my hand, not my life."

Q Any others?

A. The number of abortions in a year is one sign that occurs at Planned Parenthood, that facility, on Commonwealth Avenue.

* * *

Q. Approximately how many people are at a typical second Saturday?

A. Approximately 30.

* * *

Q. I see. So when you're sidewalk counseling on Saturday, you're standing on Alcorn Street; is that right?

A. Yes.

Q. And the prayer supporters are standing on the other side of the zone and around it; is that right?

A. Yes. I also go over there when no one else is there.

Q. So from where you stand on Alcorn Street, can you see the prayer supporters on the other side of the zone?

A. Yes.

Q. And can you hear their prayer?

A. Yes.

Q. Do any of them ever have signs?

A. Yes.

Q. How large are the signs?

A. Approximately 5 feet by 4-6 feet by 4 feet.

Q. What do the signs say?

A. It doesn't say anything. It's a picture of our Lady of Guadeloupe.

Q. And who is our Lady of Guadeloupe?

A. She's the mother of life in America.

* * *

Q. And can you see that sign when you stand on Alcorn Street?

A. Yes

* * *

Q. Does anyone ever display a cross or crucifix?

A. Yes.

Q. Which? A cross?

A. Two people have a crucifix in their hands.

* * *

Q. Since 2007, outside the Planned Parenthood clinic in Boston, have you ever seen a baby carriage?

A. I don't recall.

Q. Have you ever seen a baby casket or coffin displayed?

A. Yes.

Q. How often have you seen that?

A. Once a year, Good Friday.

Q. And where is that generally set up?

* * *

Q. What happens on Good Friday outside of Planned Parenthood?

A. We say 14 stations of the cross.

Q. Who's "we"?

A. Everybody that comes.

Q. And approximately how many people?

A. Fifty—thirty-five to fifty, perhaps.

Q. What time on Good Friday does that take place?

A. I believe it's 9:00 to 10:30.

Q. When you say 14 stations of the cross, do you say the stations of the cross out loud?

A. They are said out loud. There's a priest in presence.

* * *

Q. Have you ever seen a large cross displayed on Good Fridays?

A. I have in the past.

Q. How large is the cross you've seen?

A. Haven't seen it for a while. That's a real large one, though. Maybe 8 feet.

* * *

Q. Yes. And do you see the blue police barricade set up—

A. I do.

Q. —behind where people are standing?

A. I do.

Q. Do those protect the people standing there from the cars coming by?

A. Yes.

Q. This cross and this casket, these are directly out the front door of the clinic; is that right?

A. I believe so.

* * *

Q. Have you ever seen one of the other counselors convince a woman not to have an abortion?

A. Yes

* * *

EXCERPTS OF DECLARATION OF GREGORY SMITH [DKT. NO. 142]

* * *

I am 77 years-old and a resident of Stoughton, Massachusetts. I have five children and nine grandchildren.

* * *

For the past 18 years I have prayed the Rosary, displayed my Crucifix, and sung religious hymns nearly every Saturday from about 8:00 a.m. until 9:30 a.m. at the Planned Parenthood abortion facility at 1055 Commonwealth Avenue, Boston (hereafter, "clinic"). The clinic is located at the corner of Commonwealth Avenue and Alcorn Street. The front entrance to the clinic is located directly off a 25-foot wide public sidewalk through a recessed walkway approximately 10 feet long. Men and women entering the front of the clinic must walk across the public sidewalk to do so.

Police are present approximately 90% of time when I am at the clinic, and have been for the past 18 years.

* * *

I pray the Rosary out loud so escorts, patrons, and passersby can hear my prayer.

Every time I am at the clinic, I hear noise on Commonwealth Avenue from trains, cars, trucks, motorcycles, trolleys, buses, trash haulers, police and fire sirens, or idling vehicles. Even tourist groups and passersby contribute to ambient noise. This noise makes it difficult for people to hear me pray, and for me to hear others praying.

Prior to enactment of the buffer law, my customary routine when praying and/or displaying my Crucifix was to stand stationary on the public sidewalk directly in front the clinic entrance about six feet from the curb. This area is now squarely inside the zone.

I often pray the Rosary with other Catholics so escorts, patrons, and passersby can clearly hear our combined prayer and perhaps reconsider abortion. In my experience praying in groups tends to make my overall message more effective.

Since enactment of the new buffer law, I have repeatedly observed Planned Parenthood patrons or their companions inside zone smoking cigarettes or drinking coffee. These patrons usually stand toward Alcorn Street 6 or 7 feet from the recessed walkway. These patrons are about 35 feet away from me because I am forced by the buffer law to stand outside the zone.

Since enactment of the new buffer law, I have repeatedly observed clinic "escorts" surround, cluster, or walk with clinic patrons in areas inside the zone.

Escorts are easily identifiable because they always wear blue vests marked with the words, "PLANNED PARENTHOOD ESCORT."

Since enactment of the new buffer law, I have observed escorts standing still on the public sidewalk and street inside the zone. I've seen them stand inside the zone even when clinic patrons were not present. I've seen them drink coffee and talk with each other while standing inside the zone.

I have observed that, in almost every instance when a person appears headed toward the clinic, one or more escorts approach the person outside the zone and then walk with the person past the buffer line and up to

the door of the clinic. As they walk along, the escorts continue talking with the person so as to direct their attention away from me and prevent them from listening to me.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF GREGORY SMITH [DKT. NO. 133]

* * *

Q. How often do you go to the Planned Parenthood clinic in Boston?

A. Once a week.

Q. And when is it that you go?

A. Saturday mornings.

* * *

Q. Tell me about the second Saturdays. What's the significance of that day?

A. It's organized, more organized. It's not really—there's no—I'm not sure how much I'm supposed to vocalize on these things. But you're giving me freedom to express myself.

There could be probably 30 to 40 people there, depending on the weather.

* * *

Q. Are there any newsletters you receive that specifically speak about activities outside Boston-area clinics—

A. Yes.

Q. —including the Planned Parenthood clinic?

A. Yes.

Q. And what newsletter is that?

A. That's the Boston Rescuer.

Q. And is that produced by Operation Rescue?

A. Yes.

* * *

Q. Does the Boston Rescuer ever report on conversations that people have had outside the clinic or lives saved outside the clinic?

A. Yeah. It just says, "So far this year, you know, we've saved so many babies."

* * *

Q. Do you ever hold or display a sign?

A. No, just a crucifix, because that's my major function, is to just pray and have the crucifix there to witness.

* * *

Q. What is it that you are trying to accomplish by praying outside of Planned Parenthood?

A. Well, by praying I'm supporting in prayer our counselors so that they have success in talking the girls out of killing their babies. And making a witness—witnessing with the crucifix, Christian witness, and hopefully catching the eye of the prospective mothers that are give—abort their child.

* * *

Q. Have you ever heard a conversation between Ruth and a prospective mother?

A. No. They're too far away from me, and the noise level is such that it's hard to hear in that area, with the trains going by, the trucks going by, the cars going by. Even the bicyclists come by, and just recently we had a bicyclist that kicked one of the signs and knocked it over on his way by. This depicts—or at least shows us the level of emotional involvement that some people have in trying to get the babies killed, you know. They're obviously sympathetic to the abortion industry. So, you know, they drive by and sometimes they'll say

"Get a job" or yell out things which you can't hear. But it was pretty obvious, when he kicked the sign over, that it made a big sound and the pieces went flying, you know.

Q. So what you're referring to are people driving by on Commonwealth Ave. either in cars or on bicycles—

A. Bicycles, yeah.

Q. —who comment on the signs; is that right?

A. Yeah, sure.

Q. Do people walking down Commonwealth Ave. who may or may not be going into the clinic ever comment on the signs?

A. Sometimes they do, yes.

Q. What do they say?

A. They shout out a number of different things. Obviously they're not words of encouragement. I can't remember, you know, the exact words—not that it matters anyway. But they're obviously not, you know, supportive of where we stand, you know.

Q. But they see the sign, and they're responding to it. Is that right?

A. Yeah—not only the sign, but us, our presence, et cetera, you know. Some of them, when they're going into the clinic, if a guy is bringing in a woman, he'll just swear at the girls and stuff like that. But that's because he's emotionally involved in what he's doing there anyway, you know.

Q. When you say he swears at the girls, who are the girls you're referring to?

A. Well, just swears at the pro-lifers, you know, generally speaking. If they're having to raise their voice to reach the girl he's bringing in, obviously he's directing his swears at the particular counselors. And sometimes it's more than one counselor trying to reach them, see, so that you have more than one voice.

* * *

Q. When you stand where the casket is in this picture, are you able to hear the counselors standing on Alcorn Street?

A. We can't hear the counselors at all, I told you, because of the level of noise. We're lucky that we hear each other, in order to say—if I lead the rosary, I have to direct my voice in their direction, because they're standing over here. If they don't speak loud enough when they're leading the rosary, you can't hear them, so you don't know when they started or are in the prayer. So you like to do it together.

* * *

Q. Mr. Smith, when Attorney Viator was questioning you, she'd asked you about a loudspeaker or microphone. Do you ever use a microphone when you're at Planned Parenthood in Boston?

A. We do on the second Saturday of the month.

* * *

Q. Other than the escorts, is there anyone else that you want to hear you pray the rosary?

A. Oh, obviously we want the mothers going in to hear the prayers. And this could get—they see us out there. They see the crucifix. They hear the prayers. And this might be in the back of their mind when they go in, and some of them mull it over, they see, you know, the inside of the clinic. I've never been inside.

But they see that, and they decide not to go in, you know—to go through with it.

* * *

EXCERPTS OF DECLARATION OF CYRIL SHEA [DKT. NO. 143]

* * *

I am 84 years old. I am a father, grandfather, and great-grandfather. I am a retired orthopedic surgeon and a military veteran. I served about 12 months as a Navy apprentice seaman in World War II, and 4-5 months in Korea as a battalion surgeon with the Marines (3rd Battalion, 5th Marines) and as a surgeon in a field hospital for 4-5 months. I served a total of 3.5 years of active military service. Thereafter, I spent 10-15 years on inactive military duty. I practiced medicine for over 40 years.

I oppose the practice of abortion because of my religious, moral, and scientific beliefs that induced abortion is the deliberate destruction of innocent human life. I believe that life begins at conception. As a result of my military service, I am well-acquainted with death and brutally inflicted bodily injured.

* * *

For past six or seven years, I have been going to the public ways surrounding Planned Parenthood in Springfield (hereafter, "Planned Parenthood"), which is located at 3550 Main Street, Springfield, Massachusetts, in a medical/business complex containing three buildings at the comer of Main St. and Wason Ave. There are five driveways that permit ingress and egress to/from the complex. The five driveways service buildings at 3500 Main Street, 3550 Main Street, and 3640 Main Street. A true and accurate satellite depiction of the southernmost portion of the medical complex is attached as Ex. A. An L-shaped public sidewalk is

situated along the entire perimeter of the medical complex. *See* Ex. A.

Planned Parenthood is located in a red brick building. *See* Ex. A (long rectangular building toward the lower left hand side). The building is surrounded by large parking lots on three sides that serve as a buffer between the building and the public streets and sidewalks. *Id.* Train tracks frame the western boundary of the medical complex. *Id.* As measured in a direct line, the tracks are situated approximately 60-70 feet from the building housing Planned Parenthood.

Six other separate and distinct medical businesses are housed at 3550 Main Street along with Planned Parenthood. Also within the medical complex are two businesses in the building known as 3500 Main Street (Red Cross and Baystate Heart and Vascular Program), and ten businesses offering medical services plus a Subway restaurant in the building known as 3640 Main Street. True and accurate depictions of signage are attached as Ex. B-1 through B-3.

Because the medical complex houses twenty separate and distinct businesses, it is impossible for me to know which business or businesses a person intends to patronize when she enters the medical complex. It is therefore impossible for me to identify with particularity who might be patronizing Planned Parenthood as I'm standing on the public ways adjacent to the medical complex unless I'm told.

Main Street is a major thoroughfare in Springfield and is often busy with vehicular traffic that includes cars, trucks, heavy construction equipment, vans, motorcycles, and buses. At times, frequent noise created by vehicles makes even face to face conversation difficult. It makes oral communication at a distance impos-

sible. Also, trains use the railroad tracks adjacent to the medical complex. I have observed trains pass by while at the complex.

* * *

I go to Planned Parenthood at least once a week, sometimes more, usually on Fridays. When there, I peacefully attempt to persuade men and women not to abort their babies by helping them make an informed decision. I wear a sign around my neck that states, "They're Killing Babies Here". The sign is approximately 3.5 x 2.5 feet and is held in place by a rope. A true and accurate depiction of me wearing my sign is attached as Ex. D. I try to offer medical information on the risks of surgery and the gestational process of human beings.

I often walk back and forth on the L-shaped public sidewalk that frames the medical complex. Prior to enactment of the buffer law, I often would walk with my sign.

I cannot avoid the zones by walking in the grassy areas or parking lots of the medical complex because "private property, no trespassing" signs are situated at every driveway entrance to the medical complex. A true and accurate depiction of the no trespassing sign is attached as Ex. F. Because there is a lot of dangerous traffic, I will not cross Main Street in order to avoid the zone. True and accurate depictions of traffic on Main Street and Wason Avenue are attached as Ex. G-1 through G-3. As I understand the law, the existence of the five zones means I cannot walk with my sign along most of the public sidewalk adjacent to the medical complex without risking arrest and incarceration.

Though no warning signs are situated inside three of the five zones, I do not know whether I can lawfully enter them. All five white arcs are nearly identical in size and shape.

No one has informed me that I may enter or walk through one or more of these three zones with my sign without risking arrest and incarceration. This makes me believe all five arcs are buffer zones I cannot enter except for the sole purpose of reaching a particular destination on the other side of the zone. The arcs are very confusing.

A few weeks ago I observed a motor vehicle traveling on Main Street and, when it approached the buffer zone, it swerved and crossed the double yellow line as if to avoid the zone. It returned to its correct lane after it passed the zone.

In winter, snow piles frame the sidewalks and driveways of the medical complex. Depending on the severity of the winter weather, snowfall may be frequent and snow piles may be as high as four feet. Under these circumstances, there are very few areas of the sidewalk adjacent to the medical complex where I can walk my sign without violating the buffer law, especially because, as a result of the snow piles between the street and sidewalk, I cannot access the sidewalk except by walking up the zoned driveway. True and accurate depictions of me this past winter on the sidewalk adjacent to the medical complex are attached as Ex. H.

It is my understanding that, if I walk through a buffer zone while wearing my abortion-speech sign, I am in violation of the buffer law and subject to criminal sanctions even if my primary intent is to get to another destination.

To the degree that I'm able, I hand out literature in English and Spanish describing fetal development, alternatives to abortion, risks of abortion, and contraceptives. True and correct samples of literature I distribute are attached as Ex. E-1 through E-7. I do not speak Spanish so I can communicate to Spanish-speaking people only through literature.

Prior to enactment of the buffer law, most often I would stand a few feet from the Wason Avenue driveway entrance to the medical complex that is directly in front of the building housing Planned Parenthood. If I saw a car approach, I would wave and stretch out my hand to offer literature. If the car stopped, depending on which side of the driveway I was standing, I would approach the driver or passenger, offer literature, and try to engage them in conversation. Because the medical complex is private property, I never stood in the parking lot or next to the entrance of the building. I never stood in the driveway, either.

Now, with the buffer zones in place, I can no longer stand a few feet from the driveway. Approximately 90% of the people patronizing the businesses of the medical complex arrive by car and park in one of several lots. Never has anyone parked their car and returned to me to take my literature. Prior to enactment of the most recent buffer law, I often observed prolife individuals hand out literature to occupants of vehicle entering the driveway. Since the enactment, I have not observed even a single instance where literature was distributed to occupants inside vehicles. I have observed no more than 5% of vehicle occupants park their car and then return to the sidewalk area for counseling or literature. It is my desire to give my literature to every person patronizing Planned Parenthood.

My intended audience is persons seeking abortions. When I have an opportunity to talk with someone, I do it in a non-confrontational manner. I say "hello", ask how they are, and wish them a good day. I never shout because, in my view, it is irritating to strangers and therefore counter-productive. I have observed others shout and, when they did, persons shouted at usually ignored the shouter. I always hope to speak to a person from a conversational distance, no more than six or eight feet.

Though people can see it, my sign is not a substitute for personal, individual counseling. My desire is to persuade, not merely to be seen. It is my experience that persons are persuaded through gentle and informative one-on-one counseling at a close distance. It is impossible for me to convey fetal development or the risks of abortion in only a few sentences.

The existence of the buffer zones has severely hampered my ability to effectively communicate my message to Planned Parenthood patrons. As a retired medical doctor and military surgeon, the knowledge and perspective I bring to a conversation is considerably different from the knowledge and perspective other prolife counselors can bring.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF CYRIL SHEA [DKT. NO. 134]

* * *

Q. Thank you. How often do you go to the Planned Parenthood in Springfield?

A. Well, at least once a week or sometimes often.

Q. What day do you go?

A. I almost always go on Friday, but there might be other days that I would go such as Wednesday or Saturday as a rule.

* * *

Q. And what do you do when you go to the clinic?

A. I'm down there to pray and to indicate to the public that abortions are taking place on that campus and to make that knowledge known. And hopefully if I had the opportunity to hand out literature to clients of the abortion clinic, to guide them.

* * *

Q. I believe you stated that you—you're there to indicate to the public that abortions are taking place at this facility. How do you indicate that to the public?

A. I carry a sign.

Q. What does your sign say?

A. "They're killing babies here."

Q. How large is the print on that sign?

A. I'd say it's probably, in a given letter, it may be eight-by-five inches, something like that.

Q. And how large is the sign as a whole?

A. It would be about three and a half feet by maybe two, two and a half feet.

Q. Do you hold the sign or wear it?

A. I wear it.

Q. Do you have a string around your neck, is that how it's—

A. Well, it's not a string.

Q. Do you have some mechanism to wear it?

A. I have a rope there, yes.

Q. Do people seem to notice or read your sign?

A. Some do; some don't.

Q. How do people notice or read your sign?

A. By eyesight.

Q. What is their reaction?

A. It's very variable. Some it's quite favorable; some is negative; some is totally neutral.

* * *

Q. Is there any place in particular where you stand with your sign?

A. No.

Q. So you could be standing at any of the places that you listed before with the sign; is that right?

A. Even beyond that, I might stand on one side or the other of any of the entrances actually.

* * *

Q. Has someone ever come out of the parking lot of the facility that houses Planned Parenthood to talk to you?

A. Yes.

Q. How often has that happened?

A. That's happened to me once. I think

that's all I can remember.

Q. When was that?

A. Well, I'm not sure it falls within this timeframe. I'm a little hesitant on that. But it might have fallen within this timeframe. Might have. It might have been before that.

Q. And what happened on that occasion when the person came out of the Planned Parenthood facility to talk to you?

A. The person was angry with me and wanted to express anger.

* * *

Q. And what do you do when you participate in the 40 Days for Life?

A. We attend the medical facility area, walk about, demonstrate the signs to the public, pray, make ourselves available for information. If an opportunity arose, which, of course, is difficult under these circumstances, then to give literature.

Q. Do you ever display signs during 40 Days for Life?

A. Yes.

Q. Is it the same sign that you display other times?

A. Yes.

* * *

Q. Do you see others holding signs when you're at the—outside the facility?

A. I do see them.

Q. What signs do you see?

A. I see signs that indicate that abortion is wrong, that mothers regret their abortions, that fathers regret their lost fatherhood. There are religious signs indicating the religious positions of churches against abortion. And I think that pretty well covers it.

Q. Where do you see these signs?

A. I see them at the abortion facility, that is the entire medical complex on the sidewalks.

* * *

Q. We've talked about people that you've seen holding signs. Have you observed other people praying with you outside of the clinics?

A. Yes.

Q. Do they pray out loud?

A. Yes. Well, some do and some don't. It's a matter of preference.

Q. Do you often pray in unison or individually?

A. Often in unison; often individually.

Q. Have you ever observed others using microphones or speakers to amplify their voices?

A. Yes. But I guess—I guess I'd have to ask you about the dates and I'm unsure about the dates. But if

you can qualify your question for me, I can probably answer it.

Q. Generally speaking, in the five to six years that you have been outside of the Springfield Planned Parenthood, have you observed others using speakers or amplifiers amplify their voices?

A. Yes. I've seen that effort made.

Q. How many times approximately?

A. I don't know.

Q. On a regular basis?

A. No.

* * *

Q. When you have observed people using speakers or amplifiers, what were they saying?

A. They would be calling to people going into the abortion facility, or at least to the medical facility, asking if they're going to the Planned Parenthood abortion clinic and if so, that they could come and approach us and receive information that might be of value to them.

* * *

Q. And what have you observed Mr. Golden doing?

A. Very many of the things that I've described about of myself. They're just about the same things, plus he's a counselor and is very likely to approach people who are walking by and who he can make verbal contact with and discuss their impending abortion with them and I know in the hope of saving a baby's life.

Q. Now, since November of 2007, have you observed Mr. Golden having one of these conversations?

A. Yes.

* * *

Q. Who's Noreen Beebe?

A. Noreen Beebe is a pro-lifer who comes down and pickets with us on a frequent occasion.

Q. What have you observed her do?

A. Very much the same thing that I do. Women are very likely to try to do counseling if they can and I know Noreen has attempted to do that on occasion.

Q. And have you observed Noreen engage in counseling since November of 2007?

A. Well, I think so, but I really don't recall specifically.

* * *

Q. Is Barbara Shea your wife?

A. Yes.

Q. Does she join you outside of the facility?

A. She has. But, again, you'll have to give me the dates, I guess.

Q. Has she joined you outside of the facility since November of 2007?

A. She had a hard fall there one day because of a defective sidewalk. I'm not sure that date, but she hasn't been back, I don't think, except possibly for the 40 Days since. But it is her intention of getting back.

Q. What types of activities does she engage in when she's there?

A. Same as mine.

Q. When you say same as yours, you mean holding signs and praying?

A. Praying, sign when she has one available. She sometimes does, sometimes doesn't. And she will engage somebody in a counseling conversation if she has the opportunity. I think that pretty much characterizes her activities there.

* * *

Q. Are you aware—or were you made aware of anyone who went to Bethlehem House in response to interaction with someone outside of the Planned Parenthood facility?

A. I'm not aware of these specific persons, no.

Q. Are you aware, not of the specific individuals' identity, but are you aware that it happened?

A. Oh, yes.

Q. Approximately how often?

A. I don't know.

* * *

Q. Who is Linda—I'm going to mispronounce her last name—Desnoyers?

A. Linda Desnoyers, she's a pro-lifer who I've known for a number of years and comes down on occasion to picket with us.

Q. What types of activities does she engage in?

A. It would be very similar to my wife. I don't think Linda has a sign, but other than that.

Q. Does she engage in counseling?

A. I know she would if she had the opportunity, but, again, there aren't many opportunities now.

Q. Who is Ginny Garrity?

A. Ginny Garrity is a close friend of my wife, an intense pro-lifer, and on occasion has been down to picket with us.

Q. What have you observed Ms. Garrity do?

A. She'd do the praying. I know she would counsel if she had the opportunity. I haven't seen her do that. But I think she would be out there with her presence, as most of us, making known that there's an abortion facility here and babies are being killed.

Q. Susan Gorman, who is that?

A. Susan Gorman is another very strong pro-lifer. She's a woman who is happy to put herself forward even though she has the sorrow of an abortion and continues, I think, to this day to be in sorrow. She carries a sign that says, I regret my abortion.

* * *

Q. Who is Sandy Hines?

A. Sandy Hines is a retired teacher, strong pro-lifer who occasionally has been down picketing with us and who is on the Diocesan Pro-Life Commission, very strongly dedicated to this cause and pretty much dedicated to the same type of activities, that is prayer in the hope of saving babies.

* * *

Q. Who is Bill Bennett?

A. Bill Bennett is a friend of mine. He's a retired school teacher and he's been down there with me to picket from time to time.

* * *

Q. Who is Debbie Martell?

A. Debbie Martell is another pro-life person. She comes down to picket. She has done a number of pro-life activities and she too is there to pray and also to counsel if she gets the opportunity.

Q. Who is Bert Chasse?

A. Bert Chasse is a man about my age and he comes down and prays, prays pretty continuously when he's there.

* * *

Q. Who is Lauren Congo?

A. Lauren Congo is a young woman who—she's about 30 years old and she's a very strong left pro-life person, comes down in the hopes of saving babies and comes down, comes down and prays. And she's ready to counsel if she gets the opportunity, but rarely does, rarely gets the opportunity.

* * *

Q. Who is Lynn Congo?

A. Lynn is her mother, who I would characterize much in the same way as her daughter, but older, and also one who is very much into praying for the unborn and coming down, making her presence known, and interacting with the general picketing.

Q. Who is Patty Strain?

A. Patty Strain is the wife of a good friend Joe Strain, and the Strains are strong pro-life people. They engage in various pro-life activities whatever they can. Patty comes down, often bringing a little daughter, and prays.

* * *

Q. Who is Peter Biggins?

A. Peter Biggins is the brother of Tim Biggins who is the Diocesan pro-life—is the chairman of the Diocesans Respect Life Commission. Peter is the brother, very strong pro-lifer, and, again, a person who comes down and prays. I don't think I've seen Peter counsel, though he may, because I don't see everybody do all their activities. But very dedicated to the cause, very dedicated to saving babies.

Q. Tammy Biggins' relation?

A. Tammy Biggins would be his sister-in-law. Very similar, pro-life activist, often comes down to pray and I'm sure she would be quite amenable to counseling if she had the opportunity.

Q. Who is Dr. Jamie Leone?

A. Dr. Jamie Leone is a retired physician. He's retired because of a physical disability. He's quite a bit younger than myself. Very dedicated to the pro-life cause. Comes down when he's physically up to it and he is there to pray, to demonstrate. And I think that he holds a sign from time to time.

Q. What does his sign say?

A. I don't remember.

Q. I believe you mentioned Joseph Ott before.

A. Joe Ott, yes.

Q. Who is he; what have you observed him do?

A. Joe Ott falls into the same pattern, very strong pro-lifer for many years. He comes down to pray. Joe is very much—he is obviously doing counseling, which I think he is able do from time to time. But since the landmark date that you've given me, I don't think he's had much opportunity. I don't think so. But I guess I can't speak for him entirely.

* * *

Q. What have you observed Mary Driscoll do?

A. Mary Driscoll is very faithful. She comes every Friday. She comes in about 8:00, stays till about 10 or a little after. She comes up from Connecticut. And one, again, might describe her as a very prayerful person. She does a lot of praying. I think she sometimes carries a sign. She's very dedicated to the pro-life cause and saving babies.

* * *

Q. Who is Father Jonathan Reardon?

A. Father Jonathan Reardon is the priest of Our Saint Thomas Parish in West Springfield, although he's since been transferred within the past week. And he came down to pray with us for the 40 Days for Life on at least one occasion, and very dedicated pro-life priest who led us in prayer and who was very receptive to our cause and very promotive of our cause.

Q. Who is Sister Connie?

A. Well, Sister Connie is a nun who's retired from active service, although she's spent time in Africa and she's now retired to the—I think the Sisters of Providence Mother House. I'm not sure. I don't think that's her order, specifically. But she's retired to the Mother

House either of the Sisters of Saint Joseph or Sisters of Providence in West Springfield or Holyoke and she comes down frequently with another nun to pray and basically that's her function.

* * *

[Q.] Since the buffer lines were placed down on the streets and sidewalks, how many people who went into the parking lot and parked their vehicle actually came back to receive literature or counseling from the pro-lifers who were on the sidewalk or the street?

A. It would be very few. Did you ask for a percentage?

Q. Can you give me a percentage?

A. Well, I would think it would be five percent at the most, very most.

Q. So is it your testimony then that 95 percent of the people who pull into the driveway park their car and then go into the building housing Planned Parenthood never come back to either receive literature or talk to pro-lifers?

A. 95 percent or more.

* * *

EXCERPTS OF DECLARATION OF NANCY CLARK [DKT. NO. 144]

* * *

I am 49 years old. I have nine children. I am a resident of Worcester, Massachusetts. I have never been arrested.

I oppose the practice of abortion because of my religious and moral beliefs that induced abortion is the deliberate destruction of innocent human life. I believe that life begins at conception. I believe that women generally do not want to have abortions, but often feel forced by boyfriends, parents, employers, and other social and economic pressures to have an abortion. I believe that it is important to let these women know that there is help available for them in their time of need.

My purpose in going to Planned Parenthood in Worcester (hereafter, "Planned Parenthood") is not to protest or condemn, but rather to save lives. I attempt to do this by offering information about human life and alternatives to abortion. I also pray. I always act in a manner that is friendly and non-threatening.

I want to show people that I care, and to show sympathy for what may be a difficult situation or decision. I have observed young girls and women crying as they approach Planned Parenthood. Many appear distraught. I observed one woman who had been severely bruised and obviously had been beaten. Some women are so upset I need to calm them down before I can speak with them. It is vulnerable and confused women like these that I seek to help. I want to make sure these women truly understand their options before making an irreversible choice. If, on the other hand, a woman

appears to have her mind made up, I simply say something like, "We're here for you if you change your mind."

I sometimes see someone in a Grim Reaper costume on the public sidewalk in front of Planned Parenthood. I perceive his message to be death and judgment. This not my message. My message is life and hope. I believe the presence of the Grim Reaper is counterproductive to the message I seek to convey.

My preferred manner of expression is close personal communication, at a normal conversational level, with a kind, gentle voice, and with eye contact—from a distance of two feet. I have found that eye contact and a smile are very important to put people at ease. My experience tells me that communicating in this manner is the best way to provide information and assistance to women seeking abortion. I refer to this as "sidewalk counseling."

* * *

My usual practice is to go to Planned Parenthood two or three times per week. I go on Thursdays, Fridays, or Saturdays, but I may also go on a Tuesday or Wednesday. I go to Planned Parenthood on days I believe abortions are being performed. In general, I go between 9:30 a.m. and 11:30 a.m. but sometimes I go in the afternoon, too.

Even when other counselors are present, I still try to make myself available to talk to each and every incoming woman I can, because sometimes I can be more effective at establishing a connection with a woman than other counselors.

It is crucial for me to effectively convey my message before an abortion takes place so I have an oppor-

tunity to refer women to a pro-life pregnancy crisis center across the street called Problem Pregnancy. Every abortion is the destruction of human life, and I believe many women who have abortions suffer severe emotional scars thereafter.

I believe that speaking in a raised voice, shouting, or yelling is counterproductive. But when I'm at Planned Parenthood I cannot avoid shouting because of the distance between me and Planned Parenthood patrons. Shouting makes me appear not to care, which is directly opposite of the message I'm trying to convey. Shouting ruins my message.

The need to raise my voice is often increased not only by distance but also by traffic and other ambient noise generated on Pleasant Street, including cars, trucks, motorcycles, trash haulers, police and fire sirens, and idling vehicles. The noise makes it difficult for people to hear me, and for me to hear them. Noise is not an issue where I am permitted to approach listeners from a conversational distance of six feet or less.

* * *

I have never seen any type of vehicle enter Planned Parenthood's parking lot using the concrete walkway on Pleasant Street.

I usually stand on the public sidewalk on Pleasant Street that is across the street from Planned Parenthood. I try to station myself directly in front of the main door so I can peer through the metal fences to women entering Planned Parenthood. The fences are positioned in a way that makes it very difficult to see behind them. The place where I stand is near a bus stop approximately 100 feet from the main door. This is the only place I can stand that will allow me a momen-

tary glimpse of people going into Planned Parenthood through the main door. True and accurate depictions of me standing at this location are attached as Exhibit A.

The metal fences on the Pleasant Street side of Planned Parenthood were installed approximately one year ago. Before they were installed, I could clearly see the main door of Planned Parenthood while standing on the public sidewalk outside the buffer zone. Also, I could easily see people entering the building, and they could easily see me.

On average, I am able to converse with less than one person per week at Planned Parenthood. Rarely do I get more than a fleeting look from people entering the main door.

Only one woman out of 100 will make the effort to walk across Pleasant Street to speak with me.

If the buffer zone was not there, and I chose to stand on the Pleasant Street side, I would stand on the public sidewalk adjacent to the concrete walkway directly in front of the opening in the fence because this is the closest point to the main door that is public property. This is the best place for me to stand to reach people entering Planned Parenthood through the main door. It is half the distance to the main door from the place I now stand.

* * *

95% of people who patronize Planned Parenthood enter Planned Parenthood's driveway, park their car in Planned Parenthood's parking lot, and then walk from the parking lot directly to the main door. I get no response at all from 99% of the people who enter Planned Parenthood by way of the parking lot.

With the buffer law in effect, it is hard for me to engage in close personal communication, at a normal conversational level and distance, with a kind, gentle voice and with eye contact, unless a person is walking on the same public sidewalk I'm standing on, or gets off the bus. In most situations, this means that I am completely unable to convey my message because of noise and distance. In others, it means my message must be delivered faster, louder, and with a different content than I prefer.

* * *

To the degree that I'm able, I hand out literature describing fetal development and alternatives to abortion. I have no access to people who park in Planned Parenthood's lot, and therefore I have no ability to hand literature to them, or even offer my literature near their hands. On average, I hand out less than one piece of literature per week. In all the time I've been going to Planned Parenthood, only once did someone park their car in Planned Parenthood's lot and then come over to me to take some literature.

It is especially important for me to be able to offer Spanish-language literature near the hands of Hispanics who speak only Spanish because I do not speak Spanish and therefore cannot communicate with them except through literature. To effectively distribute literature to Spanish-speaking people, I often need to place my literature near their hands.

Of the hundreds of hours I've spent outside Planned Parenthood, I was able to converse with people perhaps 5% of the time.

With the buffer law in place, it is impossible for me to place literature near the hands of anyone after they

enter Planned Parenthood's driveway. If I am on Dewey Street, I am always at least 35 feet away from them. If I am on the Pleasant Street side, I am least 75 feet from people who park their cars in Planned Parenthood's lot and then walk to the main door.

In winter, snow piles frame the streets, sidewalks, and driveway at Planned Parenthood. Depending on the severity of the winter weather, snowfall may be frequent, and snow piles may be as high as four feet. Sometimes the streets are messy with snow and slush, and the public sidewalks are not cleared. The snow and slush make it extremely difficult and dangerous for me to approach Planned Parenthood patrons outside the zone, especially because I fear I might slip and fall down in the street in front of passing vehicles.

I sometimes hold a sign when I do not intend to speak with anyone entering Planned Parenthood. But I never hold a sign when I intend to make efforts to converse because, in my experience, it's counterproductive. For the same reason, I would not convey my message over a microphone, loudspeaker, or megaphone.

If there were no buffer zones at Planned Parenthood, I would stand on the public sidewalk a few feet from the driveway on Dewey Street so I could offer literature near the path of vehicles and speak at a normal conversational level from a normal conversational distance. In my view, that is the optimum place to offer literature and personal counseling to people patronizing Planned Parenthood.

I refrain from entering the buffer zones at Planned Parenthood out of fear I will be arrested and incarcerated if I do so. In order to best help women make an informed choice, I must communicate with them orally

from a normal conversational distance and have the opportunity to place literature near their hands so they can easily accept it. The zones prevent me from communicating in either of these ways with 95% of people I see entering the Planned Parenthood facility.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF NANCY CLARK [DKT. NO. 135]

* * *

Q. How often do you go to the Planned Parenthood clinic in Worcester?

A. Two to three days a week.

Q. Have you been going there since it opened?

A. Yes.

Q. What days do you typically go?

A. Those fluctuate, but there's a steady Thursday, I'm usually always there. Friday, if I—and Saturdays, every other Saturday, and then the other days, I might pick up a Tuesday or Wednesday if I notice that they may be doing abortions on those days.

Q. Why do you go on those particular days?

A. Those seem to be the days that they are doing abortions. It doesn't take much to see that, and I am there to try to give information to girls before they head in there.

* * *

Q. What do you do when you're there?

A. I pray. I do—I'll do a rosary usually, and—and then I just stand there and pray. And if—I try to talk to girls, try to offer them assistance.

I do tell them that there is other options. If they would like, we could help.

Q. How do you initiate these conversations with girls?

A. When I'm standing across the street, if I see people heading into the door, which I have to raise my voice and yelling basically across the street that if they need any assistance, we do counseling across the street for free.

* * *

Q. How do girls respond when you talk to them?

A. It all depends. You will get some girls that are obviously very set in their decision and they don't want to talk to anybody, but then I have had girls, you know, crying and scared about what they are about to do, and hopefully that's when I've stepped in sometimes.

And I've definitely told them that there are other options. We are free, you can come in and listen to what we have to say; but at the same time, it's your choice. If you don't like what we have to say, you can walk out right across the street, but at least you will be more informed in what you're doing or more set in what you're doing, because some girls will be crying before they go in there.

* * *

Q. And the girls that you do speak with, tell me about those conversations.

A. They range. They range from girls that are very confused and don't know what to do and they had gone to Planned Parenthood first and sometimes, you know, you get an 18-, 19-year-old that's thinking, well, that's all I can do, and then I will tell them that there's—there are other people that will help.

There are people that could help you financially. There are people that could help you with anything that

you need, and I—and I give them that option. That's—that's all I try to do.

I've had girls stand there—I had one girl tell me she had got beat up. She was excited about her pregnancy—and you should have seen this girl. She was beat up because she had told her boyfriend that she was pregnant and she—she wanted the baby, but he didn't, and this girl was, you know, black and blue all over.

So what I did then—she wasn't ready to go in—she was going to have the abortion because she was angry at him but not because she really wanted the abortion.

So because I was there, I got to get her to go into at least our place. I says we're free, maybe we can refer you to somebody else, because she obviously needed some kind of protection or something.

* * *

That was a conversation that you had with her on the sidewalk across the street from the clinic?

A. Across the street, yes.

* * *

Q. Was it within the past year?

A. Yes.

Q. Did the girl in that instance cross the street to come talk to you?

A. She was on the side. She was on the side that I was standing. She was—she had parked in the wrong parking lot.

Q. So you had this conversation on the opposite side of Pleasant Street past the clinic?

A. Yes, we were on the opposite side.

Q. Before she crossed the street to—

A. Yes, before she crossed the street.

Q. Do you often speak with girls who are coming that way to the clinic?

A. Not—not too often.

Q. Do girls ever cross the street to come talk to you?

A. Very rarely. I would say maybe one percent chance that I will get a girl to cross to street to talk to me.

Q. Approximately how often do you have a conversation with a girl?

A. In a course of a day that I'm there?

Q. Yes.

A. Maybe one a week.

* * *

Q. When you do have a conversation with a girl outside of the clinic, how long does that conversation typically last?

A. It all depends on how her heart is and where she is.

If she's set in her decision, she may talk to me for a couple of seconds and continue on.

If she is not set in her decision, she will ask questions, take my pamphlet, look at it and ask more questions, and that could go on maybe five minutes.

Q. You mentioned a pamphlet.

Do you generally hand out pamphlets when you're outside the clinic?

A. Yes.

Q. How often do people take the pamphlets from you?

A. It's not too often.

Q. Do you generally only hand the pamphlets out to girls that you've started a conversation with?

A. That willingly want it, yes.

Q. How many pamphlets do you typically hand out in a day at the clinic?

A. In a week, maybe one.

Q. Do people sometimes refuse to take the pamphlets?

A. Yes, yes.

Q. Do they tell you that they don't want information?

A. Oh, yes, yes.

Q. What do they say to you?

A. Oh, they'll swear at you, you know, mind your f-ing business, you know. They get offended sometimes. It's their right. It's their right.

Q. Do you display signs when you're outside the clinic?

A. No. Sometimes I have. I have on occasion. So say I have on occasion.

Q. When have you displayed signs?

A. When I don't plan on talking to girls.

Q. Are there particular days that you plan on talking to girls and other days that you don't?

A. No, no, it's just—sometimes I just don't feel like counseling, because it is hard, and so I'll just go over and do a rosary, and I hold a sign that will say "Face It, Abortion Kills."

Q. Why don't you hold that sign on days when you want to talk to girls?

A. Because I don't think it's effective when you're holding a sign.

Q. Why don't you think you're as effective?

A. Because when you're holding a sign that says "Face It, Abortion Kills," right off the bat the girl is thinking that you're only thinking of that—the baby.

When I'm counseling, the last person I'm usually thinking of is the baby. I get in a different—I am thinking of the girl, the situation she may be in, and hopefully we can help her.

Q. Where do you usually stand with your sign?

A. Usually right in front of the clinic on the clinic side when I hold the sign, and I'll stay to the left there, and I just walk back and forth.

Q. If I understand you correctly, you'll stand on Pleasant Street?

A. Pleasant Street.

* * *

Q. On the occasions when you do hold that sign, do people seem to notice the sign?

A. Yes.

Q. How do people respond to the sign?

A. All different kinds of reactions.

Q. What are those different reactions?

A. You get the toots and, yeah, then you get the finger and "Get a life."

Q. You get those reactions from people in cars who are driving by?

A. Yes.

Q. Do you get those reactions from people who are walking by?

A. Yes.

Q. Do you get those reactions from people who are entering the clinic?

A. Not too—no, usually no.

Q. When you're holding a sign, do girls ever come over to talk to you?

A. On one occasion I actually—I had a—I actually had a save one day. I was there not—not expecting to—

Obviously I was there to do the rosary and just hold a sign, and a girl came out of the clinic and came over to speak to me and asked me why I held the sign.

I said I really don't know. I feel like—I do it once in a while. I have no set thing. And then we got into a conversation, and she decided not to go back in.

Q. When was that?

A. Last year.

* * *

Q. Have you observed girls take public transportation into the clinic?

A. Yes, yes. We had a girl get off the bus one time where I was standing and we offered her some help.

Q. Where is the bus stop?

A. From where I'm standing, it's a little to the

* * *

Q. What is 40 Days For Life?

A. It's a campaign that they run that—I'm not really too familiar except that I show up for the 40 days.

It's a—it's more like a Catholic thing, and they try to get churches involved to be over and pray in front of the clinic, silent prayer. Or, you know, just stand there peacefully and pray for an end to abortion.

* * *

Q. When is 40 Days For Life?

A. Typically during Lent, during the Catholic Lent calendar year. And then they will have another one—they do another one. It's I think in the fall.

* * *

Q. What do you do during the 40 days?

A. They pray out loud. They do the rosary. Some will hold signs, and the signs will say "40 Days For Life, Pray to End Abortion."

Q. Where do they usually stand when they pray?

A. Across the street, across from Pleasant Street facing the clinic.

Q. You said they pray out loud?

A. Mm-hmm.

Q. Do they ever use any sort of amplifier or microphone?

A. They have been known to do that, yes.

Q. Have you observed them do that?

A. I have.

Q. When?

A. On—once or twice they showed up with this thing, these people.

Q. Were they loud?

A. Not too loud. It would be basically so that the people they brought with them could hear the priest reading the rosary. It wasn't too loud, though.

Q. Approximately how many people were there on the days when they had the microphone?

A. I don't recall.

Q. More than five?

A. Oh, yes, more than five.

Q. More than ten?

A. It all depended. Some—I don't recall.

It's—you know, we've had a large amount show up, which the police have been called, and we've had—where there's only, you know, five, you know. It's—it varies.

Q. What's the largest group you've ever observed outside the Worcester clinic?

A. When our bishop showed up at the end of the 40 days.

Q. How many people were there when the bishop showed up?

A. Maybe 100, but I am guessing on the amount.

* * *

Q. A little while ago you used the word "save."

Could you please explain to me what you mean by a "save"?

A. A save is basically when a girl is very abortion-minded and decided after speaking with us that abortion wasn't the right choice for her.

Q. How many savings have you personally had outside the Worcester clinic?

A. I really don't know.

Q. How many saves do you have in a typical month?

A. Not very lucky. Not too many. I think in the two years I've been active, maybe four.

Q. So you think you've had approximately four saves outside the Worcester clinic in the past two years?

A. Exactly.

Q. And were those all conversations that you had with girls on the sidewalk outside the clinic?

A. Yes, yes.

* * *

Q. Is this a brochure that you hand out on the sidewalk across the street from the clinic?

A. Yes.

Q. Approximately how often do you use this particular brochure?

A. This is the one that I will use if I have any luck to be able to hand it, this is what I hand out.

Q. And I believe you said you—you on average, understanding some weeks are more and others are less, you hand out information approximately once a week; is that right?

A. Once a week. I could be exaggerating, but it's—on a good week, once a week, I would hand out one, but—

Q. And some weeks you hand out none?

A. None. And other weeks I may get two people. It's very hard to put a number on it because, you know, you're standing there hundreds of hours not talking to anybody 95 percent of the time.

So when you do get to hand out information, it seems like, yeah, I finally got somebody to take something from me, but that's it.

* * *

Q. Are you trying to persuade women to go to Problem Pregnancy instead of into Planned Parenthood?

A. Yes.

Q. And on occasion, you have been successful in doing that, right?

A. Yes.

* * *

[Q.] Are you in contact with the people at Problem Pregnancy?

A. Yes.

Q. Do they report to you when a woman comes in who says she's spoken with you on the sidewalk?

A. Yes.

Q. Approximately how many times in the past two and a half years since the clinic has been opened has that happened?

A. Maybe four times.

* * *

Q. Are there any other pamphlets or brochures that you regularly use?

A. I carry a few extra things, but I basically stick with just this one.

Q. When you say "this," you're referring to Exhibit No. 1?

A. Exhibit No. 1. I also carry something from Project Rachel that I use, quite frankly. If and when I see a girl come out that's had an abortion that is crying, I will offer my assistance as well on that end and give them the Project Rachel information.

Q. What is Project Rachel?

A. They help women that have had abortions. They help counsel women that are in, you know, turmoil, that are having trouble living with what they've done. And that's basically what they do.

And they're also free, you know, they work under—all volunteers.

* * *

Q. Do you ever carry any Spanish language materials?

A. Yes.

Q. Do you speak Spanish?

A. None.

Q. So when you—

A. I actually—one of my saves was a Spanish, and it took forever, literally 30 minutes, to communicate that we could help.

I did have—I have some of these in Spanish, but she needed more than that. And it took forever because she talked no English, and I really didn't talk any Spanish.

But she understood one thing. She was expecting her fifth and was scared, and I had nine and was nutty, so there was a communication there that we could get, five and nine, that she decided to come in to Problem Pregnancy, and then we got somebody that could speak Spanish.

Q. That conversation that you had with this woman, was it on the sidewalk?

A. It was across the street. They were in their car.

Q. When you say they were in their car, did they pull over to speak with you?

A. They pulled over to—she was going to get out and I was standing right there, and I just asked if they needed any help, and it took a long time, but they—she was very distraught.

She was crying very much, so I really worked hard to try to get her to realize that we could help her.

And the husband spoke a little English, so he could translate what I was saying, and she came out.

Q. As a result of that conversation that you had with her on the sidewalk, she opted not to go into Planned Parenthood?

A. She did, and she had her baby.

* * *

[A.]one woman came back to me once to tell me she actually had changed her mind on the table in the clinic because of something I had said on the sidewalk. She came back to thank me.

* * *

Q. What is it that you're trying to accomplish outside of Planned Parenthood?

A. I am trying to obviously save babies, but more, I am trying to make sure women have all their options on the table before they head into that clinic.

I do not feel that some women are going in there with a clear mind. There are a lot of women I see going in there distraught.

And to make a decision like they are making, you really should know exactly what you're going into and what is going to happen as best as they can tell you. And so I feel if I can direct them to Problem Pregnancy, hopefully they will get an ultrasound where they can see the picture, get full information on what the procedure may entail and what the outcome could be psychologically, physically.

These women, they—you can't prepare—I've seen the scars on these women when they come out, and no

one prepared them, and that's what got me involved in this to begin with.

It was more the women. I would say I'm probably more concerned about the women going in than the child at that point.

* * *

Q. Have you personally observed women after they speak with you instead of crossing the street and go into Planned Parenthood instead walk over to Problem Pregnancy?

A. Yes.

Q. Approximately how many times?

A. Maybe, I don't know, four, five times maybe. Maybe I'm exaggerating, but I don't think so. Maybe four times. Again, when I've brought a girl [...]

Q. So you provided information to approximately four or five girls since the Worcester clinic opened?

A. Yes.

Q. That assisted them in their decision not to have an abortion?

A. Yes.

* * *

Q. Is the grim reaper ever there when you're outside—

A. He's been there. I go shoot the breeze with him for a couple of minutes sometimes.

Q. Does the grim reaper have a name?

A. Ray is all I know. But some people—everybody calls him a different name, but I call him

Ray, so I don't know if he's—what his name is. I'm going to say it's Ray.

Q. Have you ever seen him outside his costume?

A. Yes.

Q. How often is he there when you're there?

A. He's typically there—he picks Thursday, because he's—you know for sure Thursdays they do apportions, so he stands there Thursdays.

And then I don't know when else he's standing there now because he's been trying different days, so I've only seen him on Thursdays now.

Q. When Ray is standing on the same side of the clinic, do you generally stand across the street?

A. Generally, I'll go over to say hello, but I typically stay away from Ray.

Q. Why do you stay away from Ray?

A. Because that's not the message I'm—I have a different message.

Q. Oh.

How is your message different?

A. I am—I am concerned about the women, the women that are going in there and the girls, the younger girls.

My message is more for themselves.

Q. Can you see Ray from where you stand across the street?

A. Oh, yes, I can see Ray.

Q. Do people seem to respond to Ray?

A. All different kinds. Same thing, the finger, the two—you know the way people are today.

Some people think he's awesome and then other people don't. It's the way the world is.

Q. Have you seen cars honk their horns at—

A. Oh, yes.

Q. And you've observed people give him gestures?

A. Oh, all kinds, yes.

Q. How often do you see people make gestures or comments to him in response —

A. For the two hours he's there, he gets a lot of reaction one way or the other. Way more than I get when I'm standing there.

He does—he gets a lot of reaction. One way or the other, he brings attention to himself and his message.

* * *

Q. Do you observe others in this area?

A. There's one—one woman that likes to stand over the—

Q. Do you know her name?

A. Mary.

Q. What does Mary do?

A. She gives out information.

Q. Is Mary—I believe you used the term "Sidewalk" counselor?

A. Yes, she's—she's a sidewalk counselor, I guess.

Q. Why do you guess?

A. Well, everybody has their own methods. We'll just say that. She's—she's older. She's in her—at least in her '70s.

Q. How do Mary's methods differ from your methods?

A. Louder. She's—she just waves to everybody and anybody going by whether they're going in or going by, and she tries to give out information to everybody, so...

* * *

Q. So if you're standing across Dewey Street and Mary is standing to the right side of the buffer zone, you're able to see her, correct?

A. Yes.

Q. Are you able to hear Mary from there?

A. Yes.

* * *

Q. Is there anyone else that you generally see standing in this Dewey Street area?

A. A man named Paul. He comes to pray, and he'll park in that CVS parking lot and stand there with his sign.

* * *

Q. Is there anyone else that you observe when you're outside of the clinic?

A. That does what I'm doing?

Q. Engage in any—

A. Lori, a girl named Lori.

Q. What does Lori do?

A. She tries to do the same thing I'm doing.

Q. Is she a sidewalk counselor?

A. A sidewalk counselor.

Q. Where does Lori typically stand?

A. Over where I would be, Pleasant Street.

Q. Is Lori there often at the same time as you?

A. The only day that you can maybe bump into people for sure would be Thursday, so other than that, no, I haven't seen Lori—

I saw Lori just last week. We all have families, so it's—it's all volunteer, so when we can get there.

Lori can go months without being there, and that's how it works.

Q. Have you ever observed Lori walk a woman over to Problem Pregnancy?

A. No, I haven't.

Q. Do you know if she has any saves outside the Worcester clinic?

A. I know she has walked people into Problem Pregnancy.

Q. Do you know approximately how many?

A. No.

Q. Are there any other sidewalk counselors you know of?

A. Just Linda, Linda McManus, but you put her down.

Q. How often is Linda McManus there?

A. We all try to get there once a week, but over the summer Linda hasn't been there at all.

* * *

Q. Do you ever observe anyone else holding signs outside the clinic?

A. Yes, there's—it's a picture. There's a man that shows up on Saturdays. He holds a picture.

Q. What is the picture of?

A. I think it's the Blessed Mother. I don't know if it's Fatima or—but a holy—it's definitely a holy picture, and it's a big one.

* * *

Q. Do people ever respond to his picture?

A. Yes, same way, you get the fingers and the—even with our blessed mother, you'll get the people yelling out and then you'll get the toots, the happy, but you'll get the fingers.

It's—people are funny. This is America.

Q. And again, those are people who are driving by and—

A. Just driving by people.

Q. Or people who are walking down the sidewalk?

A. Yes.

* * *

Q. Tommy Quinto, is it?

A. I think it's Quinto.

Q. Is it Quinto?

A. I think it's Quinto. He's a handicapped man. He shows up in a wheelchair. He's—he's very pro-life, and he sits there with me, and he's the only one that will show up when it's below zero and be my prayer person when I'm over there.

* * *

Q. Does he have any signs with him?

A. Sometimes he'll hang a sign over his head that says "Unpleasant on Pleasant Street."

* * *

Q. Mrs. Clark, I believe that you stated several times as Ms. Viator was questioning you that you raise your voice or you yell; is that true?

A. Yes.

Q. Why do you yell?

A. Because I'm across the street. I'm too far away to the door. I'm across the street. So I have to yell to—to try to get—you know, because I see the women going in, I try to yell so they can—

Q. Is there—is there any other reason that you yell other than to get the attention of people who are across the street?

A. That's the only reason. No.

Q. What's your preferred method of communicating?

A. Eye contact. Number one, my preferred would be able to be able to walk up, look in somebody's eyes and say we're here to help, speaking just regular, and, you know, just trying to engage in a conversation without having to raise my voice.

Q. And what distance would you like to maintain between you and the person you're trying to talk to?

A. Ideally, two feet. It's—you know, like this, but that would be ideal.

Q. Is there any other circumstance in life where you try to communicate with people from 35 feet?

A. No, unless—I mean, if you call yelling out the window to your kids if they're running down the street, then yes, I scream out the window. My kids will tell you.

* * *

Q. Okay.

So just so the record will be clear, it sounds like you're saying that you'd like to stand on a public sidewalk—

A. Mm-hmm.

Q. —closest to Planned Parenthood on the Pleasant Street side right near the fence?

A. Yes.

Q. And why is that?

A. Because I would be at—they go in the door. The door is underneath here (indicating), and I would—I would still be a good distance, but I would not have to raise my voice quite as much to get their attention to maybe come out and see me?

* * *

Q. Can you estimate how far away you are when you're standing across the street from the entrance to Planned Parenthood?

A. I feel like I'm a length of a football feet. I feel like that. I feel like I'm aleast 100 feet, I would think. I don't—I'm not into—too far. Too far and there's too much, because usually the timing will be when there's a girl going in, there's an 18-wheeler going by.

Q. When you yell, can you notice any response from people that you're trying to communicate with?

A. They will look sometimes. I will get a look before they go into the door, but that will be it.

Q. Anything else? What else do you notice from responses from people when you yell to them?

A. They just don't respond at all. I'm sure they're thinking that I'm some nut across the street screaming something because they probably—I don't know if they can hear me. I'm pretty sure sometimes no, they just hear me screaming.

Q. How does being forced to yell affect your message?

A. It's huge.

Q. Why is it huge?

A. It's a huge effect.

Q. How so?

A. Because my message is—I just—I'm trying get my message out there that I do care. I have seen—I have seen girls come out scarred, and I just want to make sure before they go in there they are positive they're ready for what they're about to do.

Q. Do you feel you're demonstrating a caring attitude when you're yelling at people?

A. Oh, no, I'm sure they think I'm a nut over there. I'm standing over there just—I'm yelling as loud as I can to—I have a loud voice because I am a mother with nine kids, but my voice, you have to really yell to get anything across, for anyone to hear me.

Q. In your opinion, how does your having to yell affect the effectiveness of your message?

A. There's no effect. It ruins it. It completely ruins the—my message.

* * *

[Q.] Why is it that you believe you're so ineffective in being able to hand out literature while you're at Planned Parenthood?

A. Because of the way the parking is set up.

Q. Can you elaborate on that, please?

A. The parking lot is set up behind the clinic. If they pull into the parking lot and you walk into the clinic, no matter where I stand I have no access to them.

Q. If there were no buffer zones at the Planned Parenthood in Worcester, where would be the best place for you to stand in order to be able to effectively offer literature to people going into the Planned Parenthood?

A. The—I would guess the Dewey Street side.

Q. When you say the Dewey Street side, where exactly would you stand?

A. You would have to stand right at their driveway, almost, if that would be legal.

Q. Well, where would you stand if you had the choice?

A. A picture of the Dewey Street side, if I had a choice—

Q. Once again, you're pointing to Exhibit No. 7 from your deposition?

A. 7.

Q. And it's a photograph of Planned Parenthood's driveway on Dewey Street looking from across the street into the parking lot, correct?

A. Yes.

Q. Okay.

Now, where would you stand, if you could, in the absence any buffer zones?

A. Right there on the right side when you're looking at the parking lot.

Q. It looks to me you're pointing at this photograph and you're pointing to the public sidewalk immediately adjacent to the driveway; is that correct?

A. Yes.

Q. And why would you stand there?

A. Well, if I want to be more successful in getting out the paperwork, I would probably draw attention, you know, when they drive in. I know that if you're waving the paperwork, they may stop and take some from you, but...

Q. In your opinion are people most likely to accept literature from you if you're standing a foot away from them as opposed to 35 feet away?

A. Definitely.

* * *

[Q.] What message do you believe the grim reaper expresses when he's out there?

A. He's trying to express death, that abortion is murder, end of story.

Q. And how does that message differ from your message?

A. My message is I'm trying to get to the girls that—it—their confusion and their pain that they're in that day is not going to end that day with an abortion.

Q. Is the grim reaper's message counterproductive to yours?

A. It may be.

Q. What do you think?

A. Yes.

* * *

EXCERPTS OF DECLARATION OF MARK BASHOUR [DKT. NO. 145]

* * *

I believe that women generally do not want to have abortions, but often feel forced by boyfriends, parents, employers, and other social and economic pressures to have an abortion. I believe that it is important to let these women know that there is help available for them in their time of need.

For twenty years or so, I have been going to the public ways surrounding Planned Parenthood in Worcester (hereafter, "Planned Parenthood"), which presently is located at 470 Pleasant Street, Worcester, Massachusetts. Planned Parenthood moved to this location in or about December, 2009. Before that, Planned Parenthood was located at 631 Lincoln Street, Worcester, Massachusetts.

My usual practice is to go to Planned Parenthood twice a week. Sometimes I go once a week, sometimes three times. I go on Thursdays, Fridays, or Saturdays because I believe abortions are performed on those days. I usually arrive at 8:00 or 9:00 a.m. and stay until 11:00 a.m. I am usually alone after 10:00 am on any given day, and often I'm alone on Saturdays.

Even when other counselors are present, I still try to make myself available to talk to each and every incoming woman I can, because sometimes I can be more effective at establishing a connection with a woman than other counselors.

It is crucial for me to effectively convey my message before an abortion takes place so I have an opportunity to refer women to a pro-life pregnancy crisis

center across the street called Problem Pregnancy. Every abortion is the destruction of human life, and I believe many women who have abortions suffer severe emotional scarring.

My purpose in going to Planned Parenthood is not to protest or condemn, but rather to save lives. I attempt to do this by offering information about human life, alternatives to abortion, and helping the mother and unborn baby in any way I can.

* * *

My intent is to convey a message of life and hope, not death and judgment.

I have found that effective communication requires a close personal approach, at a normal conversational level, with a kind, gentle voice, and with eye contact—from a distance of three or four feet. I have found that eye contact and a smile are very important to put people at ease. In my experience, communicating in above manner is the only way for me to effectively provide alternatives to women seeking abortion. I refer to this as "sidewalk counseling."

I believe that speaking in a raised voice, shouting, or yelling is counterproductive, and I try to avoid it where possible.

* * *

There is one buffer zone arc painted white on Pleasant Street. This arc begins on the public sidewalk surrounding the concrete walkway that leads to the main door. The walkway is about 14 feet at its widest point adjacent to the public sidewalk and narrows as it continues toward the main door. I have never observed a vehicle enter Planned Parenthood's parking lot using

this concrete walkway. True and accurate depictions of this buffer zone are attached as Ex. A-1 through A-3.

* * *

The metal fences on the Pleasant Street side of Planned Parenthood were installed approximately one year ago. Before they were installed, I could clearly see the main door of Planned Parenthood while standing on the public sidewalk outside the buffer zone. I also could easily see persons entering the building, and they could easily see me. True and accurate depictions of the main door area prior to fence installation are attached as Ex. E-1 through E-3.

With the fences installed, I cannot see the main door or view persons entering the building. At most, I can catch a fleeting glimpse through small, narrow cutouts in the fence. When I call out to persons walking from the Planned Parenthood parking lot to the main door, I cannot tell whether they heard me or understood my words. In addition to fencing, columns and sometimes vehicles block my vision. True and accurate before and after depictions of my vantage point from the eastern side of the Pleasant Street zone are attached as Ex. F-1 and F-2.

The combination of fencing and buffer zone renders my communication attempts ineffective. To be effective, I must make eye contact and demonstrate a caring demeanor. Neither of these qualities can be conveyed through a fence that is 75 feet from the main door.

85-90% of people who patronize Planned Parenthood enter by the driveway on Dewey Street, park their car in Planned Parenthood's parking lot, and then walk from the parking lot directly to the main door.

No woman that parked her car in Planned Parenthood's lot has ever come over to speak with me while I was standing on the Pleasant Street public sidewalk behind the fence. I get no response from 99% of the people who enter the main door by way of the parking lot.

If I stand on the opposite sidewalk on Pleasant Street directly across from the opening in the fence, I am about 100 feet from the main door.

The neighborhood in which Planned Parenthood is located is mixed residential/commercial/office. Therefore, I do not know whether a woman walking along the sidewalk is a Planned Parenthood patron until she turns into the concrete walkway. By that time, she is in the middle of the buffer zone and I'm at least 35 feet away.

With the buffer law in effect, in most instances it is hard for me to engage in close personal communication, at a normal conversational level and distance, with a kind, gentle voice and with eye contact. In some situations, this means that I am completely unable to convey my message because of distance. In others, it means my message must be delivered faster, louder, and with a different content than I prefer.

Since December, 2009, I have been able to provide in-depth one-on-one counseling Planned Parenthood to only six or seven women. With one exception, all of these women sought access to the main door through the concrete walkway on Pleasant Street.

On those rare occasions that I am able to reach a person who is walking toward Planned Parenthood, I walk along beside her/him and speak at a conversational level. But, as we approach the buffer zone, I am

forced to stop at the line. If the person continues walking and passes the line, I must raise my voice in order for that person to hear me, especially because she/he now has her/his back to me, is walking away from me, and will quickly disappear behind the fence if they are patronizing Planned Parenthood.

Also, because I am required to stop at the buffer line, I am forced to ask the person to stop with me on the street or sidewalk and not cross the line, which I believe implies that I am untrustworthy or should be feared. I have found that stopping at the line causes my message to be less effective or ineffective because I have less time to convey it.

Although I do not like to do this, the need to raise my voice is often increased not only by distance but also by traffic and other ambient noise generated on Pleasant Street, including cars, trucks, motorcycles, trash haulers, police and fire sirens, and idling vehicles. The noise makes it difficult for people to hear me, and for me to hear them. Noise is not an issue when I approach listeners from a conversational distance of six feet or less.

With the buffer zone in place there are, in my view, only three logical places I can stand to orally communicate a message to persons patronizing Planned Parenthood. One, at the edge of the eastern buffer line on Pleasant Street, which is about 75 feet away from the main door but through a fence; two, directly across from the opening in the fence, which places me over 100 feet from the main door; or three, at the edge of the zone across from the driveway on Dewey Street, which puts me over 300 feet from the main door. This is a Hobson's choice for me because I cannot communicate effectively from any of them.

If the buffer zone was not in place, and I chose to stand on Pleasant Street rather than near the driveway on Dewey Street, I would stand on the Pleasant Street public sidewalk directly in front of the main door. From there, I could see people entering the door to Planned Parenthood through the small opening in the fence, and they could see me. At that location, I would be about 50 feet from the main door.

To the degree that I'm able, I hand out literature in English and Spanish describing fetal development and alternatives to abortion. True and correct samples of some of the literature I distribute are attached as Ex. G. I do not speak Spanish so it is imperative that I stand near the path of Spanish-only speaking passersby so I can place literature near their hands.

Because Planned Parenthood moved to its present location after the buffer law took effect, I have never had the opportunity to stand a few feet from the driveway on Dewey Street to offer literature. At first I tried offering literature on Dewey Street from outside the zone directly across from the driveway, but my efforts were futile because people almost always parked over 200 feet away. With one exception, no one ever came back to take my literature.

I estimate that, measuring in a straight line, it is approximately 325 feet from the point at the driveway entrance where it meets Dewey Street (southwest corner) to the point at the far corner of Planned Parenthood's parking lot near the building (northeast corner). Because the driveway is L-shaped, and a building not owned or occupied by Planned Parenthood is in the line of vision, it is not possible to see point to point at street level. If a patron pulls into the driveway and parks toward the north or northeast of Planned

Parenthood's parking lot, I cannot see her exit her vehicle or enter the main door if I am standing near the zone on Dewey Street.

Because of a building obstruction, I can see no more than 50% of Planned Parenthood's parking lot from Dewey Street. The section of parking lot I cannot see is the section closest to Planned Parenthood's main door. It is in this un-viewable section that the majority of women patronizing Planned Parenthood park their cars.

It is impossible for me to place literature near the hands of anyone after they enter Planned Parenthood's driveway because I am always at least 35 feet away from them. If I am on the Pleasant Street side, I am least 75 feet from people who park their cars in Planned Parenthood's lot and then proceed to the main door.

When Planned Parenthood was on Lincoln Street, I often distributed literature while standing a few feet from the driveway. As a car approached I waved and stretched out my arm with literature in hand, which people often accepted. When possible, I engaged people in conversation. In my experience, standing a few feet from the driveway gave me the greatest opportunity to hand out literature and converse with people patronizing Planned Parenthood.

In winter, snow piles frame the streets, sidewalks, and driveway at Planned Parenthood. Depending on the severity of the winter weather, snowfall may be frequent, and snow piles may be as high as four feet. Sometimes the streets are messy with snow and slush, and the public sidewalks are not cleared. At these times, it is extremely difficult to see or maneuver around the zones. True and accurate depictions of the

area surrounding Planned Parenthood this past winter are attached as Ex. H-1 through H-5.

I do not hold a sign at Planned Parenthood. In my experience, holding up a sign is too impersonal and therefore not very effective for me in communicating my message. My approach is personal—I can convey concern and sympathy with my eyes. In my view, these virtues cannot be conveyed by holding a sign. For the same reason, I would not convey my message over a microphone, loudspeaker, or megaphone. Close personal contact is essential to my ability to convey my message of love, hope, caring, and gentleness.

Based on my pre-buffer zone experience at Lincoln Street, should the buffer zone be removed, I would probably start handing out literature at the Dewey Street entrance. The close proximity to cars entering the parking lot most likely the best opportunity for me to hand out literature.

I refrain from entering the buffer zones at Planned Parenthood because I will abide by the Law of the Commonwealth of Massachusetts until it is changed or ruled unconstitutional. I choose not to violate the law even when I disagree with it.

In order to best help women make an informed choice, I must communicate with them orally from a normal conversational distance and have the opportunity to place literature near their hands so they can easily accept it. The zones prevent me from communicating in either of these ways with 90% of people I see entering the Planned Parenthood facility.

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF MARK BASHOUR [DKT. NO. 136]

* * *

Q. Do women sometimes come talk to you?

A. It happens very rarely. Now, it might happen if they're walking, I might get a chance to speak to them. That does happen, but this happens very rarely.

As far as women who have parked—about 85, 90 percent of them park inside the parking lot area. Has a woman ever come to talk to me from there, from that spot? No.

What has happened is a couple of times their boyfriends have come out and spoken to me and I've spoken to the boyfriend, and then he will go speak to her. But this happens not very often.

Okay. I would—and I think sometimes maybe if I had a chance to speak to her ahead of time, I could have changed it, but she's up there already. He is sympathetic. He—he is very much—but she's up there. She's having the abortion. So this is the problem we have.

Q. Approximately how many times since the clinic opened in early December of 2009 have you had a conversation with either a woman or someone accompanying a woman to the clinic?

A. How many times. Conversation. I'd say six or seven times I had a good conversation with someone.

Q. What do you define as a good conversation?

A. Where I could speak with them, tell them what we do and that they're attentive. They want to think

openly about the situation. They're ready to think openly about it.

They're not in a mode where they're making excuses, but they're openly looking for another avenue to solve their problem.

So I would say about six or seven times.

Q. Can you describe for me that conversation?

A. Okay.

This is one of the first ones that happened. It happened very early in December of '09, one of the first times.

There was a woman, she parked in Dewey Street. She came off in Dewey Street, and she parked—which doesn't happen very often, it's a rare event, she parked very close.

I couldn't give out any hand information to her. She parked very close. I had no control of the situation, but she just simply walked over to me.

And this is a rare event. She walked over to me. She crossed the buffer zone area. She genuinely wanted an alternative.

So I had a nice talk with her and went into the clinic, and I called up people. And one of our counselors, our woman counselors indoors came and spoke to her, and it worked out very well.

She had the alternative. She knew the alternative, and we took good care of her. But this does not happen very often.

Q. When you say she parked close, do you mean that she parked close to Dewey Street?

A. Close to Dewey Street, yes. Close to Dewey Street. She could have driven another 120 feet further away, which is what usually does happen. And then they usually don't come by, and I haven't been able to give them any literature, and they usually can't even hear me from out there, so—

Q. When you say you took her to the clinic, are you referring to Problem Pregnancy across the street?

A. Oh, yes, yes, good question.

* * *

[Q.] You said that you hand out literature?

A. Yes.

Q. How often do you hand out literature?

A. I'm there all the time to do so. As far as the people who are going from Dewey Street, hardly ever.

Q. I'm not asking about Dewey Street.

A. Okay, okay, yeah.

Q. I'm asking on average, when you're outside the clinic—

A. Okay, okay.

Q. —how often do people take literature from you?

A. Okay.

I would say maybe a couple of times a week. A couple of times a week someone will take literature from me, yes.

* * *

Q. What is Problem Pregnancy?

A. We are a nonprofit organization, all—volunteer. It was an organization—what we do is we help these women through these difficult times.

We help them financially in any other way possible while they carry their baby, do not abort their baby but carry their baby and deliver their baby to a very happy childbirth, and from there we try to help them.

If they chose to keep their baby and raise their baby, we help them in any way possible there.

If they want to put the baby up for adoption, we help them there as well.

* * *

Q. And do you try to convince pregnant women or persuade them to go to Problem Pregnancy as opposed to into the Planned Parenthood clinic?

A. Absolutely. That's what I'm trying to do, yes.

Q. Have you ever been successful?

A. Oh, sure.

Q. How many times have you been successful at the Worcester clinic in particular?

A. You mean at the Pleasant Street clinic?

Q. Yes.

A. Okay. One time it was just me by myself. That's one of the first times we talked about, the situation with the woman on Dewey Street parked much closer than most women usually do, and then she came to me. Okay. That was a very fortunate instance.

Other times it has happened, but we have had other people who are part of the process, too.

Now, we have this woman, she's a nun, and there is something about this woman, this nun, that people are just drawn to her.

So she was there and she was on Dewey Street, and she could not—obviously she couldn't just give out literature inside the zone, but they see her and they came to her.

So one time she was there and they called for me because I had to—the office was closed at that time. So I had a key and I got her inside. I got everyone inside. So I was part of that. I was able to speak to them.

Another time a woman came later on, and she was walking. She didn't go to Dewey Street, but she saw me on Main Street, and I got her—she asked me some questions and she came to me and we went to Problem Pregnancy. Had a nice talk with her. She wanted tests, she wanted some help, and she learned all the alternatives to abortion and did not have an abortion.

Q. I believe you said that interaction was on Main Street.

A. Yes.

Q. Did you mean it was on Pleasant Street?

A. Oh, yes. I'm sorry. I keep saying Main Street. I mean Pleasant Street. I'm sorry, I don't know why I'm saying—maybe because Dewey is such a side street that's not that much use. Pleasant Street seems more like Main Street.

But it's not Main Street; it's Pleasant Street, yes.

Q. Okay.

So the—that, I believe, were three times that you mentioned that you were involved in bringing the

woman to Problem Pregnancy instead of Planned Parenthood?

A. Yes.

Q. Do you call that a save?

A. I think of it as a save when someone who would have otherwise had an abortion if they had gone into a clinic, they were there to have an abortion, they see me instead and they have their child instead. So I'll consider that a save.

Q. Have you had any other saves other than those three that we just talked about outside the 470 Pleasant Street—

A. Yes, at 470 Pleasant Street. Are you talking specifically 470 Pleasant Street?

Q. Yes.

A. Okay. There have been others over the past year and a half, someone has come to me or they met some other counselor and that other counselor has come to me.

I believe it's a couple of times through the nun who has the—this gift. And we—we've worked together. We've done this.

Another time—another woman counselor who is there, she may have been at Dewey Street. They talked to her. Then I went over, I spoke to her as well, and we call it a team effort, but we had another save.

Q. So I believe if my count is right, there were—we're talking about approximately five or six—

A. Something like that, yes.

Q. —saves?

A. Yes, five or six saves like that, yes.

Q. So you've been involved in—

A. I've been involved in about five or six saves, yes, since we've been there in the last year and a half.

* * *

Q. But how often do you hand out any literature, not—not just this piece of literature?

A. Okay, this—okay, umm, I don't know. I've passed out literature to sometimes the wrong person. Someone that's going for an abortion, they take it. Sometimes that happens maybe once a week, I'll give it to someone, and it turned out they weren't go in for an abortion.

I'll pass it out to somebody else who will go in, but we don't hear it. So maybe once a week or so I can give out some—it was a lot more before the buffer zone.

Q. Generally speaking, regardless of where somebody goes after, are you saying that you on average hand out one piece of literature a week?

A. I would say about a week, yes. Whether it's someone going in or not, but all together one week.

Q. Do you generally only hand out literature to someone once you've initiated a conversation with them?

A. I can sometimes give it beforehand, like sometimes take the literature. It might never get to the conversation stage.

Again, as the people who come in through the sidewalk, maybe 10, 15 percent at best—again, somebody—I—they might be going into the clinic anyways.

I like to reach 85 percent of the people, not just 10, 15 percent, and that's the problem.

* * *

[Q.]So in the past year and a half outside the Worcester clinic, you have had some involvement in five or six saves, right?

A. Yes, mm-hmm.

Q. And that was accomplished primarily by talking to women on the sidewalk and by handing them literature, right?

A. Yes, talking to them, showing my concern for them and telling them about the alternatives, yes.

* * *

Q. What is 40 Days For Life?

A. It's the lent period when people from the time of Ash Wednesday day to Easter will come out here and they will, umm—they will stand with their signs.

Q. Are they the—the same signs that—that you just referenced or do they have different signs during 40 Days For Life?

A. They may have different ones. They could have different ones. I'm just not sure.

Q. What do they do? Do they do anything other than stand there with their signs?

A. Oh, much prayer. They're doing a lot of praying, a lot of vocal praying, yes, a lot of praying.

Q. Approximately how many people turn out during 40 Days For Life?

A. You have 30, 40 people at one time, and in—maybe they will go and make some other people show up.

But you could have 30, 40 people one day for that and then, I don't know, some days it might be more, some days less. Depends on what day it is.

If we're talking a Saturday—I don't know, maybe in a weekday, I've seen weekdays, on a Thursday, a lot of people there.

* * *

Q. You participate in those prayer gatherings?

A. Sometimes. But if it's a day when they're doing abortions, I'll probably be counseling across the street.

But if it's a day or a time when they're not doing abortions, I'll be there with them, sure.

Q. So if it is a day when they're doing abortions and you're on the same side of Pleasant Street as the clinic, you can see the people from across the street, right?

A. From where I'm standing, yes, I can see them, yes.

Q. Do they pray out loud?

A. Yes. They vocalize. Yes, they pray out loud, yes.

Q. Do they pray the rosary?

A. Oh, absolutely, yes.

Q. Can you hear them from across Pleasant Street?

A. I can hear them, yes. I can hear them. They're—it's pleasant. It's very—they sound nice when they do it. They're not overly loud by any stretch of the imagination, but they're—

I can hear. It sounds nice.

Q. Have you ever observed anyone using a microphone or other amplifier while praying?

A. I'm not sure, but I think when the bishop came, a couple of times he may have used that. I'm not sure. I could be wrong. I don't want to say for sure.

We may have, but I'm not 100 percent sure anyone's using a microphone. It's possible.

Q. The bishop led the prayer while he's there?

A. He's led some prayer services, yes, he has.

* * *

Q. Are there larger groups when the bishop is there?

A. I do—his being there will almost guarantee we'll have 40 or 50 people there. Almost guarantee that.

We've had large groups even without him, but with him it's almost a guarantee we're going to have a lot of people there.

Q. What's the largest group you've ever seen there?

A. I'm not a person who took an actual count, but just here alone, we may have had 40, 50 people and we may have had a lot of people down on Dewey Street at the same time.

So it's possible we've had upwards of maybe 75 people here. We might have had a few people over here, too, praying.

Q. When you say over "here," you're referring to the same side as the clinic?

A. Yes, the clinic side. We may have a few people there at the same time, so we could have had as many as—

If you count both sides of Pleasant Street and Dewey Street, we may have had times we've had as many as 80 people. I haven't taken an actual count, but my approximation would be something like that.

* * *

Q. Have you ever observed Lori bring a woman over to Problem Pregnancy?

A. I have actually, yes. I've seen her bring people to Problem Pregnancy. I think I've seen Nancy so as well.

I've seen people—we do not have them at Lincoln Street, but we do have them at Pleasant Street, and I think they do a real—I think they do very well under the circumstances.

I mean, considering the circumstances that are much tougher, I think we do pretty well.

Q. Approximately how many times have you seen Lori walk a woman over to Problem Pregnancy?

A. It seems to me maybe two or three times.

Q. And approximately how many times have you seen Nancy walk a woman over to Problem Pregnancy?

A. Maybe two or three times I've seen them, yes.

Q. And how many times have you seen Sister Mary Jeanne bring someone there?

A. Probably a little more than that, maybe four or five times at Pleasant Street.

Q. So that's in the past—

A. In the past year and a half.

* * *

Q. Now, we spoke earlier about when you call out to women and initiate conversations with them—

A. Mm-hmm.

Q. —or call out to them and offer help?

A. Yes.

Q. And I want to make sure that—that we're clear here. Approximately how many times a day do you call out to a woman?

A. Okay. Call out to a woman on a daily basis who's coming in there, I could say anywhere from eight to twelve times from the parking lot.

Q. And of those eight to twelve times, how—approximately how many times does the person entering the clinic look at you?

A. I'm not even sure if half those times they look at me. If they do look at me, they might not be sure what to—I'm not even sure if they know the words I'm using.

* * *

Q. How many times does any woman to whom you've offered help respond to you in any way?

A. Okay. On a—let's say a regular basis, say more days than not, no one's going to—no woman would respond to me who's coming in from the parking lot.

Maybe every day or so I'll get some woman respond to me coming from the parking lot—I mean from the sidewalk.

* * *

Q. How long does your typical interaction with one of these women take?

A. Where they've actually responded to me?

Q. Yes.

A. Okay. More typically, they'll say a few things and keep on going, so it might only be a few seconds.

If I had a chance to give them the literature and speak to them, we could be there for 15, 20 minutes talking.

* * *

Q. How many times a week does a woman respond to you in either a positive or a negative way?

A. Positive, negative—umm, who's going in for an abortion, okay, who I think is going in for an abortion?

Q. How many times a week does any woman to whom you have offered help—

A. Okay.

Q. —respond to you in either a positive or a negative way?

A. Oh, okay. Maybe—maybe 10, 15 percent who come through the sidewalk, I'll get some positive responses. I'll get some.

Q. So 10 to 15 percent of the people who you offer assistance to will respond to you in a positive way?

A. I can't say it's 10 to 15 percent, but we'll say maybe from that point, half of that 10, 15 percent respond in a positive way.

Some will be positive to me, some will be—as I say, have no positive reaction. Some can be pretty nasty. I admit to that.

Q. Some can be nasty?

A. That can always happen, but some will be polite.

Q. You said 10 to 15 percent. And in terms of numbers—

A. Is—is what will go from the sidewalk, yes.

Q. Mm-hmm.

So in terms of numbers, approximately how many women will stop to talk to you, however briefly, in a typical week?

A. Typical week, okay, typical week, maybe a couple on a typical week. If I'm there three days, three days, then I might get two to stop.

If I'm there on a Saturday and they're very—not doing much business and everyone's [...]

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138]

* * *

Q. And when did you join the Attorney General's Office?

A. February 2008.

Q. And what is your job title?

A. Investigator.

Q. And what's your job description if you know?

A. I do various investigations for the Public Protection Advocacy Bureau, so it could be anything from locating, interviewing witnesses to doing background checks on people and corporations. It could be undercover work or do research. It really varies.

* * *

Q. And you also observed three women counsellors talking to a young Hispanic woman; is that right?

A. Yes.

Q. And they were in front of Shaw's Market?

A. Yes on.

Q. On the corner of Alcorn and Commonwealth Avenue?

A. Yes.

Q. And you saw one woman hand—I'll withdraw that. You saw one of those women place her hand on the young women's shoulder; is that correct?

A. Yes.

Q. Would you characterize the placing of a hand on the shoulder as a demonstration of compassion?

A. I'm not sure.

Q. Not sure?

A. Yes.

Q. Demonstration of comfort?

A. Yeah.

Q. Demonstration of empathy perhaps?

A. Yes.

* * *

Q. Getting back to this young Hispanic woman that you observed on the corner of Commonwealth and Alcorn Street, she was speaking with three women; is that correct?

A. Yes.

Q. Were you able to—I think you testified that you were not able to hear them from your vantage point on Alcorn Street; correct?

A. I wasn't hearing what they were saying to her.

Q. Were you able to hear them?

A. Yes.

Q. So, you just couldn't make out except the words; is that correct?

A. I couldn't hear them speaking to her, but I heard them earlier.

Q. But you could not hear them speaking to her?

A. Yes.

Q. You were able to hear them earlier from the same vantage point?

A. Yes.

Q. Could you tell whether or not they were speaking in a normal conversational level?

A. I guess I was, because I couldn't hear them.

* * *

[Q.] After you observed the three women talking with this young Hispanic woman, did you observe the young Hispanic woman accompany two women to a car?

A. Yes.

Q. And the women got in the car?

A. Yes.

Q. And they drove away together?

A. Yes.

Q. Did the woman, the young Hispanic woman, get into the car voluntarily?

A. Yes.

* * *

Q. By the way, you arrived at Planned Parenthood on Commonwealth Avenue on April 2 at about nine o'clock?

A. Yes.

Q. And then around 9:40, you observed a group of people, about 75 people; is that right?

A. Yes.

* * *

[Q.] September 10 of 2010, you went to Planned Parenthood in Worcester at 470 Pleasant Street, and you got there at approximately 9:30?

A. Yes.

Q. And you pulled into a driveway, a parking lot; is that correct?

A. Correct.

* * *

Q. Which parking lot did you pull into?

A. It would be the parking lot here on the corner of Dewey and Pleasant.

Q. Could you put a P right where you parked?

A. We didn't really park. We just kind of pulled in.

Q. Well, you pulled in—is it fair to say you pulled in and stopped?

A. Yes.

* * *

Q. Do you know whether or not that parking lot is part of the Planned Parenthood facility?

A. I'm pretty sure it's not part of the facility.

Q. Do you know whether or not a buffer zone encumbers any of that parking lot?

A. It does not.

Q. When you first arrived and pulled into the parking lot and sort of were standing in there for a few minutes, a middle-aged woman approached you; is that right?

A. Yes.

Q. And she identified herself as Lori; is that correct?

A. Yes.

Q. And she handed your investigative partner two brochures; is that right?

A. Yes.

Q. And she pleaded with you to go and talk with Kathy across the street?

A. I don't think she said Kathy.

Q. Do you know what she said?

A. She said come across the street; we can help you.

Q. Do you understand what she meant by come across the street?

A. Yes.

Q. What did she mean?

A. To go to Problem Pregnancy.

Q. Lori told you there were other options instead of abortion?

A. Yes.

Q. Lori said we love you to the two of you in the car; is that right?

A. Yes.

Q. And at one point, Lori Egan said thanks for being so kind, because not everybody is this nice?

A. Yes.

Q. Now, as you pulled into the parking lot and then entered into the building, you heard some other women shouting from across Pleasant Street; is that right?

A. Yes.

* * *

Q. And you heard them say we love you, please come talk to us?

A. Yes.

Q. Did you hear another woman say from across the street come and talk to us, there are other options?

A. Yes.

Q. Is it true that Lori repeatedly said to you, we love you, please come talk to us before you make any decision?

A. She said it twice.

* * *

Q. After your encounter with Lori, you pulled into the parking lot behind Planned Parenthood; is that correct?

A. Yes.

Q. And you entered in through the driveway that's on Dewey Street?

A. Yes.

Q. By the way, is it your understanding that the only driveway entrance into Planned Parenthood in Worcester is through that driveway on Dewey Street?

A. Yes.

Q. And when you were on Dewey Street, you heard someone else call to you, girls, we love you, please come talk to us?

A. Yes.

Q. And as you were entering into the Planned Parenthood building, you actually heard somebody through the fence—

A. Yes.

Q. —who also said, come across the street and talk?

A. Yes.

* * *

Q. On July 8, you and Investigator Amanda George visited the Springfield Planned Parenthood at Main Street; is that correct?

A. Yes.

Q. And you got there at about 9:55 a.m.; is that right?

A. Yes.

Q. And when you arrived, you saw two older men at the middle entrance on Main Street; is that right?

A. Yes.

Q. And they were standing on the sidewalk outside the buffer zone; correct?

A. Correct.

Q. And one man was holding a sign that said, abortion hurts women, choose life?

A. Yes.

Q. Now, you also saw one of those men hold up a pamphlet as you drove by; is that correct?

A. Yes.

Q. Did you understand that he was offering you literature?

A. It looked like he was just waving at us.

Q. Did he have literature in his hand?

A. Yes.

Q. Do you think perhaps he might have been trying to offer you literature?

A. Yes.

Q. At about ten o'clock, you entered the driveway on Wason Avenue into the Planned Parenthood complex?

A. Yes.

Q. Do you remember which driveway you entered?

A. The one directly in front of the building.

* * *

Q. And when you entered into the driveway at about ten o'clock in front of Planned Parenthood, you didn't see anybody there; is that right?

A. Correct.

Q. And then you left about ten minutes later; is that right?

A. Yes.

Q. You saw three men standing outside the buffer zone?

A. Yes.

Q. And they were waving at cars that were exiting the parking lot on Wason Avenue; is that right?

A. Yes.

Q. You didn't hear them say anything; did you?

A. No.

Q. About ten minutes later at 10:19, you saw a man with a framed picture of the Virgin Mary; is that right?

A. Yes.

Q. He was outside the buffer zone; wasn't he?

A. Yes.

* * *

Q. On July 7, you and an investigator, Amanda George, visited the Planned Parenthood facility at 470 Pleasant Street in Worcester; is that right?

A. Yes.

Q. You arrived about 9:40 a.m.?

A. Yes.

Q. And when you arrived, you saw about nine people on the sidewalk surrounding the buffer zone of Pleasant Avenue?

A. Yes.

* * *

Q. And you saw one person among the nine who was wearing what we might call a grim reaper costume; is that right?

A. Yes.

Q. The grim reaper is the sign of death; isn't it?

A. Yes.

Q. Also among those nine people was an older man holding a sign that read abortion is a bad sin; is that right?

A. Yes.

* * *

Q. You also observed an older man standing on the sidewalk across the street from the entrance with a sign that says, God loves you mom and dad; is that right?

A. That was on Dewey Street, yes.

Q. On Dewey Street?

A. Yes.

Q. And that man waved to you as you entered the driveway; correct?

A. Yes.

* * *

Q. And you stood outside in the front of the facility near the entrance?

A. Yes.

Q. And you were able to hear a woman from across the street say to you, anything you need, we can help you, come across the street; is that right?

A. Yes.

* * *

Q. When you saw people holding the signs, could you tell whether they were nice people?

A. No.

Q. Could you tell whether they were gentle?

A. No.

Q. Could you tell they were loving?

A. No.

Q. Could you tell whether they were hateful?

A. No.

Q. It's not possible to know that just by looking at somebody holding a sign; is it?

MR. SALINGER: Objection.

MR. DePRIMO: You can answer.

A. It could be, I mean depending on what they were doing.

Q. But when you were there on April 2, you couldn't tell; is that right?

A. Correct.

Q. When it comes to conveying a message, do you know whether a sign is more effective than a piece of paper?

A. What do you mean, like on the street?

Q. Just generally speaking, but we'll confine it to people say outside of Planned Parenthood.

A. Okay.

Q. Do you know whether or not conveying a message through a sign is more effective than through a piece of literature that may be handed out?

A. I'm not sure.

Q. You don't know?

A. No.

Q. Do you know whether or not a sign is more effective than a face-to-face conversation?

A. I'm not sure.

Q. You don't know?

A. No.

Q. Are you more likely to be persuaded by a person shouting from 35 feet away or by somebody who's standing a few feet away from you smiling and talking in a normal conversational level?

A. Are we talking about if I was going into Planned Parenthood?

Q. I'm just talking generally.

A. I mean, I might see the sign. That might catch my attention.

Q. Well, let's rephrase this. I wasn't talking about a sign. We're not talking about signs. We're not talking about literature. I'll rephrase the question.

Are you more likely to be persuaded by a person who's shouting at you from 35 feet away or by somebody who's standing a few feet from you who's smiling at you and talking to you in a normal conservational level?

A. Persuaded to do what? Because if they were shouting at me to get out of the street, then I might be persuaded by that.

Q. Fair enough. If somebody was trying to persuade you to buy a product, is it more effective for somebody to yell at you from 35 feet away or for some-

body to talk to you from a few feet smiling in a normal conversational level?

A. I guess smiling and talking.

Q. Closer is better?

MR. SALINGER: Objection.

MR. DePRIMO: You can answer.

A. I guess it would depend on how close.

Q. How close would they need to be?

MR. SALINGER: Objection.

Q. You can answer the question. We're talking about you.

A. Right.

MR. SALINGER: We're not talking about much of anything actually.

Q. You can answer.

A. So, if someone is trying to sell me something, is it better if they're close? I guess yeah. If I could see the product they were trying to sell me, that would be better.

Q. Do you know whether or not that's true of other people?

A. I do not.

* * *

Q. Are you, talking you personally, are you more likely to reach out and take a piece of literature from someone who places it near your hand as you walked by as compared to somebody who waves it at you from 35 feet away?

A. Yes.

* * *

Q. Now, when you saw these women going into the clinic, did you approach them and ask them what methods of communication they would prefer to receive?

A. No.

Q. So, you don't know whether or not they prefer a sign as compared to a piece of literature as compared to normal conversation?

A. No.

Q. Do you customarily converse with your friends from 35 feet away?

A. Sometimes I shout at my boyfriend from across my apartment.

Q. I don't know perceptions, but customarily when you converse with friends, how far are you away from them?

A. Face to face.

Q. Give me a distance.

MR. SALINGER: Objection.

A. A few feet.

Q. A few feet, so when you're talking to somebody generally from a conversational distance, that conversational distance is about two feet; is that right?

MR. SALINGER: The Witness said a few feet.

Q. How do you define a few feet?

A. Two to three feet.

Q. You went inside the various Planned Parenthood clinics; is that correct?

A. Correct.

Q. Inside the facility?

A. Yes.

Q. Did you ever talk to anybody from a distance of 35 feet or more when you were inside the clinic?

A. No.

Q. Did you ever see anybody else talking from a distance of 35 feet or more inside the facility?

A. No.

Q. During your investigations in Springfield and Worcester, how many people did you observe pull into the Planned Parenthood park lots, park their car, and then walk back to pro-life advocates who were on the sidewalk?

A. None.

Q. Would you agree that it's easier for someone to simply—I'll withdraw that question. As somebody is approaching the clinic driveway in a motor vehicle, is it easier for them to simply pause briefly at the edge of the driveway, roll down their window, take a piece of paper from somebody offering it as compared to pulling all the way into the parking lot and then return to walk to the sidewalk to get that piece of paper?

MR. SALINGER: Objection.

Q. Do you understand the question?

A. Yes.

Q. What's your answer?

A. Yeah, I guess that would be easier.

Q. It's easier to simply roll down your window and take a piece of paper; correct?

A. Yes.

Q. It takes much more effort to walk back to the sidewalk area; correct?

A. Yes, for some people.

* * *

Q. Let's talk about that young Hispanic woman a little bit. Do you recall using the word responsive to describe how that young Hispanic woman was reacting to the three women talking to her?

A. Yes.

Q. How do you know she was responsive?

A. She wasn't walking away from them. She was accepting the literature.

Q. Anything else?

A. She seemed like she was listening to what they were saying.

Q. You don't describe anybody else that you saw at Planned Parenthood in Boston that day as being responsive; is that right?

A. Right.

Q. Is that because you didn't observe anybody else being responsive?

A. Yeah, I guess so, yeah.

Q. Did you use the term responsive in any of your memos to describe any other patrons?

A. No.

Q. So, you only saw one person during your entire investigation of the Planned Parenthood who was responsive to a pro-life individual?

A. That I saw, yeah.

Q. You saw people holding pro-life signs when you went to the various clinics on the various days; right?

A. Right.

Q. But you didn't observe anyone being responsive to those signs; did you?

A. No.

Q. Everybody just kind of walked on by; is that right?

A. Yes.

Q. Were the women speaking to the Hispanic woman speaking through a megaphone?

A. No.

Q. Or a microphone?

A. No.

Q. Were they shouting?

A. No.

Q. They were speaking at very close range; weren't they?

A. Yes.

Q. They were close enough to make eye contact; weren't they?

A. Yes.

Q. So, based on the visits that you made to three clinics, you saw people try to express a pro-life message through signs, through prayers, through shouts, and through the offering of literature; is that right?

A. Yes.

Q. But the only time you saw anybody responsive was that one time on April 2, 2010, when that Hispanic woman was responsive to the three woman whom you described as counselling her; is that right?

A. Yes.

* * *

Q. Ms. Metzger, earlier Mr. DePrimo asked you some questions about what you observed when you were at the Boston Planned Parenthood clinic on Good Friday of 2010; do you recall that?

A. Yes.

Q. Could you tell us a little bit more about the group of 35 people or so that he was asking you questions about; what did you observe about that group?

A. So, it was men and women. There was children there, and they all had prayer books, and they were praying, and they were singing at times, and when we first arrived, we came up Alcorn Street, and we did walk into the clinic.

So, when we were walking on Comm. Ave., people actually talked to us or they shouted, and I think it was us or, you know, it could have been at other people, but they said your baby has a heartbeat and, you know, abortion is forever, and that's when I could see, you know, the baby coffin.

I saw the giant cross in the front, and then there was also a crucifix and all the various signs, and we saw them in different angles on Alcorn Street, on Comm. Ave. We crossed the street on Comm. Ave., you know, on the train tracks and observed, and then, you know, observed on the roof as well.

* * *

Q. In addition to the gentleman holding the sign that says twice they're killing babies here, there are three other gentlemen depicted in that photo; is that right?

A. Yes.

Q. What were they doing?

A. They were praying and singing.

Q. Were they standing outside the buffer zone?

A. Yes.

Q. And are they immediately in front of the clinic entrance?

A. Yes.

* * *

Q. Mr. DePrimo asked you about observations you made of a young Hispanic woman who spoke with three counsellors. Is that part of what's depicted in this photo?

A. Yes.

Q. So, tell me what this photo is; what's going on in this picture?

A. The woman, the Hispanic woman, I think was going into the clinic walking down Commonwealth Ave., and these three women approached her, and they

handed her the literature that she's holding and, you know, it looks like they're counselling her.

Q. The three women who approached her, had you noticed them earlier that day?

A. Yes.

Q. What had you observed them doing earlier that day?

A. I saw them handing out pamphlets to other people, and they're the women that were telling us that our baby has a heartbeat.

Q. Did you see either them approach the Hispanic woman or the Hispanic woman approach them?

A. I think they approached her.

Q. As she was walking down the sidewalk?

A. Yes.

Q. And this is a photo of the four of them talking?

A. Yes.

Q. Could you tell us what else you observed that morning regarding the interactions between this Hispanic woman and any of these three women in the photo?

A. I mean, they talked to her for approximately 30 minutes, and then when we were on the roof I saw them actually lead her across the street, and one of them I guess their car was parked across the street on Commonwealth Ave. One of them got in the driver's side.

Another of the women got into the passenger seat, and then the Hispanic woman got into the backseat, and then they drove off down Commonwealth Ave.

* * *

Q. You said that you had observed these women handing out pamphlets earlier in the morning. Did you have any other observations about people handing out pamphlets that day?

A. Yes.

Q. Tell us about that.

A. When I was leaving the clinic, I was exiting, and I was walking down Commonwealth Ave., and one of the protesters handed me a small pamphlet.

* * *

Q. And what did somebody have to do or what did somebody do in order to get this pamphlet into your hands?

A. They just reached out their hands and held it out for me.

Q. As you walked down the sidewalk?

A. Yes.

* * *

Q. Let us turn our attention to your visits to the Planned Parenthood clinic in Worcester. You explained to Mr. DePrimo what happened when you first arrived and you pulled into the neighboring driveway; do you recall that?

A. Yes.

Q. I think you said that one of the women who was speaking with you wanted you to go to Problem Pregnancy; is that right?

A. Yes.

Q. What did you understand Problem Pregnancy to be?

A. I know that they are across the street, and they are pro-life. I think it might be Christian-based, but they usually get people over there that they think might be going to Planned Parenthood, and I know perform ultrasounds there, but they do not perform abortions, and they usually, you know, counsel women who are thinking about getting abortions.

Q. You told Mr. DePrimo that you and the person you were with that day were handed a number of different pamphlets; is that right?

A. Yes.

* * *

[Q.] He asked you some questions about whether or not the driveway that leads up to the Planned Parenthood clinic entrance is adjacent to or near the clinic.

Can you just describe in words for the record how it is that the driveway leads from Dewey Street to the clinic entrance?

A. So, you would pull into the entrance off of Dewey Street, and then you'd take another left, and that would lead you directly to the entrance of the facility.

Q. So, if you're coming by car, and you're trying to park as close as possible to the actual building entrance, you would drive in off of Dewey Street and follow the drive around to the left and park in one of those spots; right?

A. Yes.

* * *

Q. What did you observe the grim reaper character doing that day?

A. Well, he's wearing dark clothes and a mask and has a scythe, and he was just kind of walking around on Pleasant, on Pleasant Ave., Pleasant Ave. or Pleasant Street.

* * *

Q. And the gentleman holding the sign that said God loves you, mom and dad, and the woman standing next to him, where are they standing?

A. They're on Dewey Ave. on the sidewalk.

Q. The white line immediately in front of them, is that the buffer zone line?

A. Yes.

Q. So, they were on the other side of Dewey Ave. from the entrance to the clinic driveway?

A. Yes.

Q. And you testified before that you have driven your car on Pleasant Street down Dewey Ave., and taken this left into this driveway; correct?

A. Yes.

Q. When you do that, how close is the passenger door to where these two people were standing?

A. It's pretty close, because I'd be on the right-hand side of the street, and then they were right there on the sidewalk, so a couple of feet.

Q. So, if somebody was in their car, stopped their car there, would it be easy enough for somebody on the

edge of the buffer zone to hand them a pamphlet or talk to them?

A. Yes.

* * *

Q. Ms. Metzger, I'm going to direct your attention to Exhibit 9 for your deposition. This exhibit depicts the Hispanic woman with three other women that we've been talking about throughout your deposition; is that correct?

A. Yes.

Q. And you testified that this young Hispanic woman was walking along the sidewalk when she was approached by these three women?

A. Yes.

Q. What direction was she coming from?

A. I think she was coming from—she was away from the clinic walking towards it on Comm. Ave. I don't know what direction it was.

Q. So, if the clinic is—in this photograph, the clinic is to the right; correct?

A. Yes.

Q. And she was coming from sort of the opposite way walking toward the clinic on the public sidewalk?

A. Yes.

Q. So, she was approached by these three women before she got to the buffer zone; is that right?

A. Yes.

* * *

STIPULATION REGARDING BUFFER ZONE MEASUREMENTS [DKT. NO. 129]

For the purpose of the bench trial on plaintiffs' as-applied challenge to the constitutionality of Mass. G.L. c. 266, § 120E1/2, as revised effective November 13, 2007, the parties hereby stipulate to the following:

Boston

Planned Parenthood: Greater Boston Health Center ("Boston PP") is located at 1055 Commonwealth Ave. in the Allston-Brighton neighborhood of Boston, Massachusetts.

Boston PP is located in a stand-alone building on the north side of Commonwealth Ave. at the corner with Alcorn St. to its west.

Boston PP's front door faces Commonwealth Ave. The front door is set back approximately 12 feet from the public sidewalk that runs along the front of the building on Commonwealth Ave., and is recessed into an open foyer inside the building. The entrance to the foyer is 7 feet, 4 inches wide at its narrowest point. There is also a rear garage entrance facing Gardner St., which runs parallel to Commonwealth Ave. to the north.

There are two buffer zones marked with arcs painted in yellow and posted with signs that contain the language in M.G.L. c. 266, § 120E 1/2(b), one on Commonwealth Ave. and one on Gardner St.

The arc on Commonwealth Ave. surrounds the front door. It measures 56 feet from edge to edge along the public sidewalk. A sign is posted on the façade of the building immediately adjacent to the open foyer

that contains that language in M.G.L. c. 266, § 120E 1/2(b). This sign faces Commonwealth Ave.

The eastern-most edge of the arc is 22 feet, 7 inches from the nearest part of the open foyer at the front door to Boston PP along the public sidewalk of Commonwealth Ave.

The western-most edge of the arc is 26 feet, 1 inch from the nearest part of the open foyer at the front door to Boston PP. It extends at is farthest point 4 feet, 4 inches into Alcorn Street parallel to Commonwealth Ave. The western-most edge of the arc at that point measures 21 feet, 9 inches from the curb of Alcorn St. that is opposite the Boston PP.

The northern-most edge of the arc extends 12 feet from the corner of the building down Alcorn St.

At the southern-most edge of the arc, the buffer zone marking extends in straight lines opposite the outside bounds of the open foyer at the front door to the curb of Commonwealth Ave. The public sidewalk along Commonwealth Ave. in front of Boston PP is 25 feet wide, measuring from the Boston PP building to the curb. To the immediate east and west of the straight lines, the arc's farthest point is on the public sidewalk 1 foot from the curb of Commonwealth Ave.

The arc on Gardner Street measures a 35-foot radius surrounding the rear garage entrance. Gardner St. is 34 feet, 3 inches wide at that point. A sign is posted on the façade of the building immediately adjacent to the garage entrance that contains that language in M.G.L. c. 266, § 120E 1/2(b). This sign faces Gardner St.

Fair and accurate photographs of the public ways surrounding Boston PP taken from the roof of the building are attached in Exhibit A.

Worcester

Planned Parenthood: Central Massachusetts Health Center ("Worcester PP") is located at 470 Pleasant St., Worcester, Massachusetts. The driveway entrance to Worcester PP is located around the corner on Dewey St. Worcester PP's parking lot is L-shaped.

Worcester PP is located in a stand-alone building. The building has three floors. The ground floor of the building is approximately one-third of the building's entire length. The remaining two-thirds of the ground level area are a covered concrete walkway and blacktop pavement used for vehicle parking.

The main door to Worcester PP is recessed under the overhang of the building. It is accessible directly from Worcester PP's parking lot. The main door is also accessible from Pleasant St. by way of a concrete walkway. Two staggered metal fences, combined, run the entire length of the building along Pleasant St. The inner fence is located 38 feet, 8 inches from the main door at its nearest point. The outer fence is located 44 feet, 9 inches from the main door at its nearest point. Persons may access the main door by passing through the staggered fences, which are 6 feet, 1 inch apart at their nearest point. The main door is located 53 feet, 9 inches from the public sidewalk on Pleasant Street as measured in a straight line.

There are two buffer zones marked with arcs painted in white and posted with signs that contain the language in M.G.L. c. 266, § 120E1/2(b), one on Pleasant St. and one on Dewey St.

The arc on Pleasant St. surrounds the concrete walkway that leads to the main door. The walkway is 12 feet, 11 inches at its widest point adjacent to the public sidewalk and narrows as it continues toward the main door.

The arc on Pleasant St. measures 83 feet, 1 inch in a straight line from edge to edge along the public sidewalk. The public sidewalk along Pleasant St. is 8 feet, 6 inches wide at that point. The arc crosses over a double yellow line in the middle of Pleasant St. The top of the arc measures 34 feet, 10 inches from the curb of Pleasant St. adjacent to the center of the concrete walkway. The top of the arc measures 3 feet, 10 inches from the curb of Pleasant St. that is directly opposite and across the street from the concrete walkway.

Two signs are posted inside the arc on Pleasant St. toward the outmost edges. The sign on the west side of the arc is positioned 18 feet, 8 inches from the painted arc. The sign posted on the east side of the arc is positioned directly adjacent to the painted arc. Both signs face Pleasant St. These signs contain the language in M.G.L. c. 266, § 120E 1/2(b).

The arc on Dewey St. surrounds the driveway entrance to the Worcester PP parking lot. The arc measures 93 feet, 7 inches in a straight line from edge to edge along the public sidewalk. Both the north and south lines of the Dewey St. buffer zone arc are located 36 feet, 7 inches from the nearest edge of Worcester PP's driveway. The top of the arc crosses Dewey St. to a point on a public sidewalk that is 5 feet, 8 inches beyond the street curb opposite the driveway.

One sign is posted inside the arc on Dewey St. The sign is located 2 feet from the driveway and 34 feet, 7 inches from the nearest point on the arc. The sign con-

tains the language in M.G.L. c. 266, § 120E 1/2(b). This sign faces Dewey St.

The statutory language on the three posted signs is printed in black, 36 point type.

Springfield

Planned Parenthood: Western Massachusetts Health Center ("Springfield PP") is located at 3550 Main St., Springfield, Massachusetts, in a medical complex containing three buildings at the corner of Main St. and Wason Ave.

Springfield PP is located in red brick building with a brown roof. The doors of this building are set back 316 feet, 2 inches from Main St. and 206 feet, 5 inches from Wason Ave. Seven other separate and distinct medical businesses are housed in this building along with Springfield PP.

There are five driveway entrances/exits for ingress and egress at the medical complex, three on Main St. and two on Wason Ave.

There are two driveway entrances around which arcs are painted in white. Signs containing the language in M.G.L. c. 266, § 120E 1/2(b) have been placed inside the painted white arcs, one on Wason Ave. and one on Main St. The statutory language on the two signs is printed in black, 36 point type.

The arc surrounding the western-most driveway entrance on Wason Ave. measures 100 feet, 5 inches in a straight line from edge to edge along the public sidewalk. The top of the arc crosses over a faded double yellow line in the middle of Wason Ave. The top of the arc measures 12 feet, 5 inches from the curb of Wason Ave. that is opposite the driveway entrance to the medical complex. A sign is posted inside the arc that con-

tains the language in M.G.L. c. 266, § 120E 1/2(b). This sign faces Wason Ave.

The arc surrounding the middle driveway entrance on Main St. measures 99 feet, 1 inch in a straight line from edge to edge along the public sidewalk. The top of the arc crosses over a double yellow line in the middle of Main St. The top of the arc measures 21 feet, 4 inches from the curb of Main St. that is opposite the driveway entrance to the medical complex. A sign is posted inside the arc that contains the language in M.G.L. c. 266, § 120E 1/2(b). This sign faces Main St.

There are three additional driveway entrances around which arcs are painted in white. Signs containing the language in M.G.L. c. 266, § 120E 1/2(b) have not been placed inside these arcs.

The arc surrounding the eastern-most driveway entrance on Wason Ave. measures 95 feet, 5 inches in a straight line from edge to edge along the public sidewalk. The top of the arc crosses over a faded double yellow line in the middle of Wason Ave. The top of the arc measures 12 feet, 5 inches from the curb of Wason Ave. that is opposite the driveway entrance to the medical complex.

The arc surrounding the southern-most driveway entrance on Main St. measures 99 feet, 9 inches in a straight line from edge to edge along the public sidewalk. The top of the arc crosses over a double yellow line in the middle of Main St. The top of the arc measures 21 feet, 4 inches from the curb of Main St. that is opposite the driveway entrance to the medical complex.

The arc surrounding the northern-most driveway entrance on Main St. measures 100 feet, 2 inches in a

straight line from edge to edge along the public sidewalk. The top of the arc crosses over a double yellow line in the middle of Main St. The top of the arc measures 21 feet, 4 inches from the curb of Main St. that is opposite the driveway entrance to the medical complex.

Each arc measures 35 feet in a straight line from the middle of the driveway (where the bottom of the driveway meets the street) to the arc's highest point. This line is perpendicular to the street.

The stretch of public sidewalk representing the property line of the medical complex along Wason Ave. measures 514 feet, 10 inches.

The stretch of public sidewalk representing the property line of the medical complex along Main St. measures 906 feet, 2 inches.

EXHIBIT 12 TO DEPOSITION TESTIMONY OF JEAN BLACKBURN ZARRELLA [DKT. NO. 132-4]

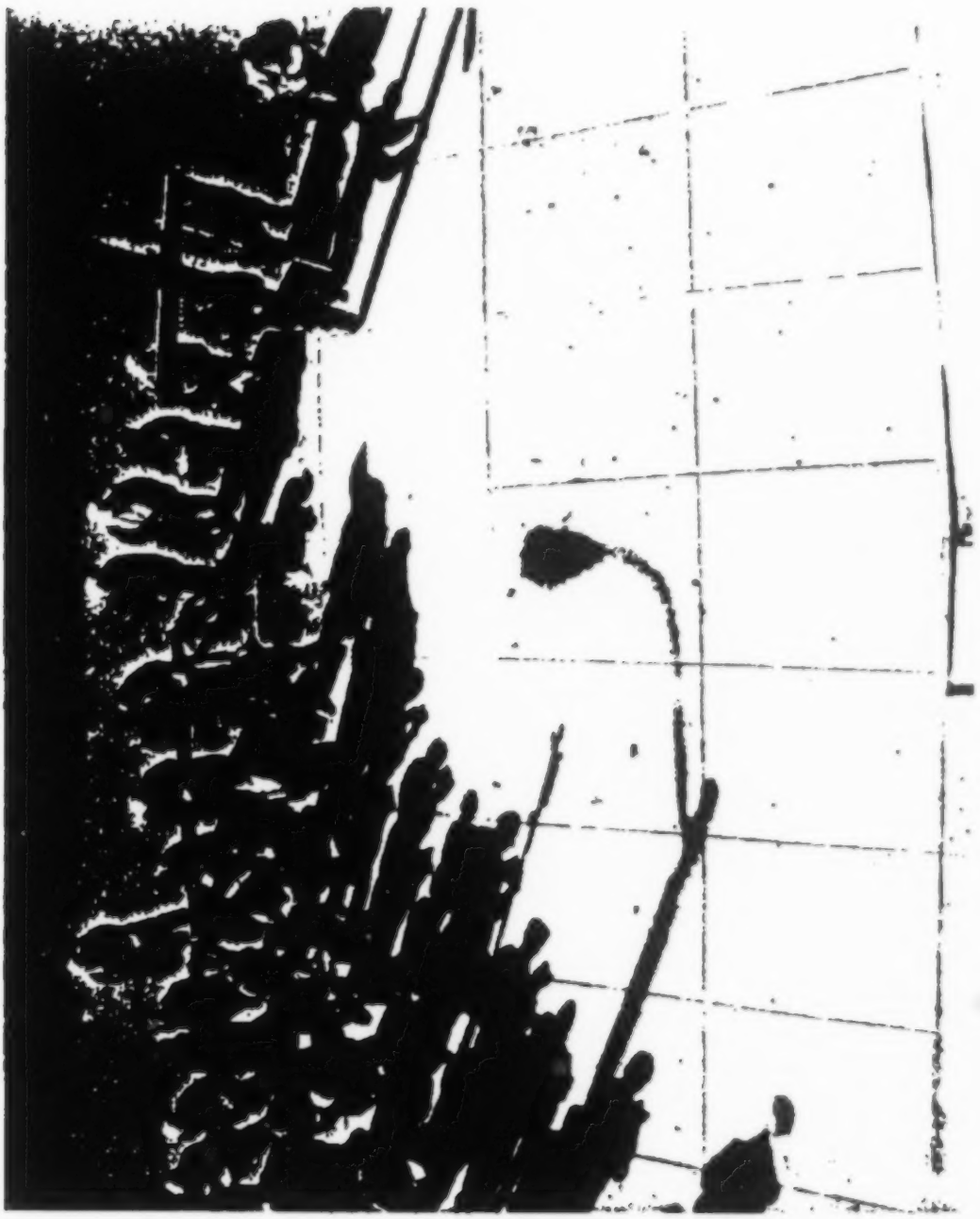


EXHIBIT 3 TO DEPOSITION TESTIMONY OF CYRIL SHEA [DKT. NO. 134-3]

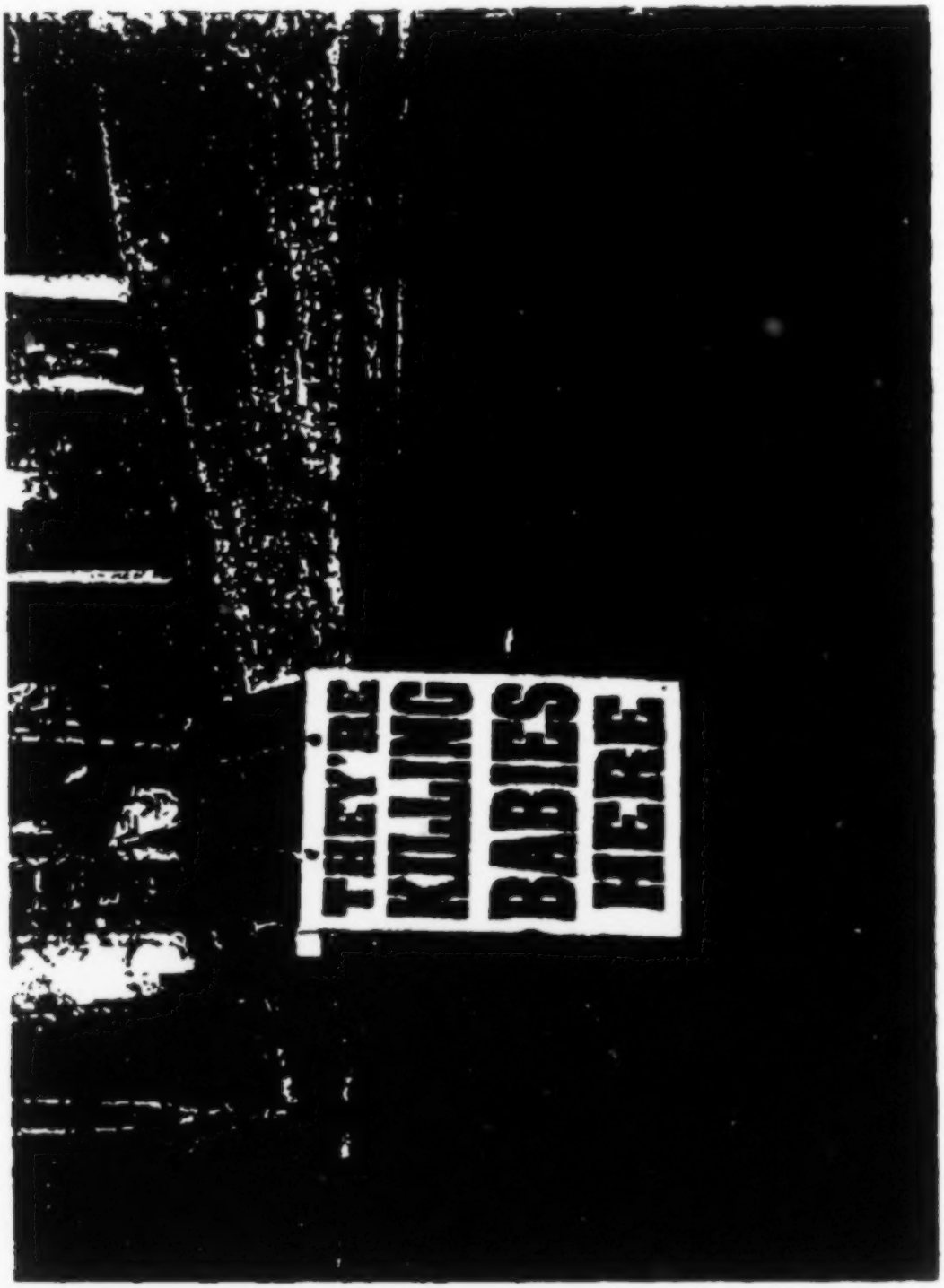


EXHIBIT 3 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-3]

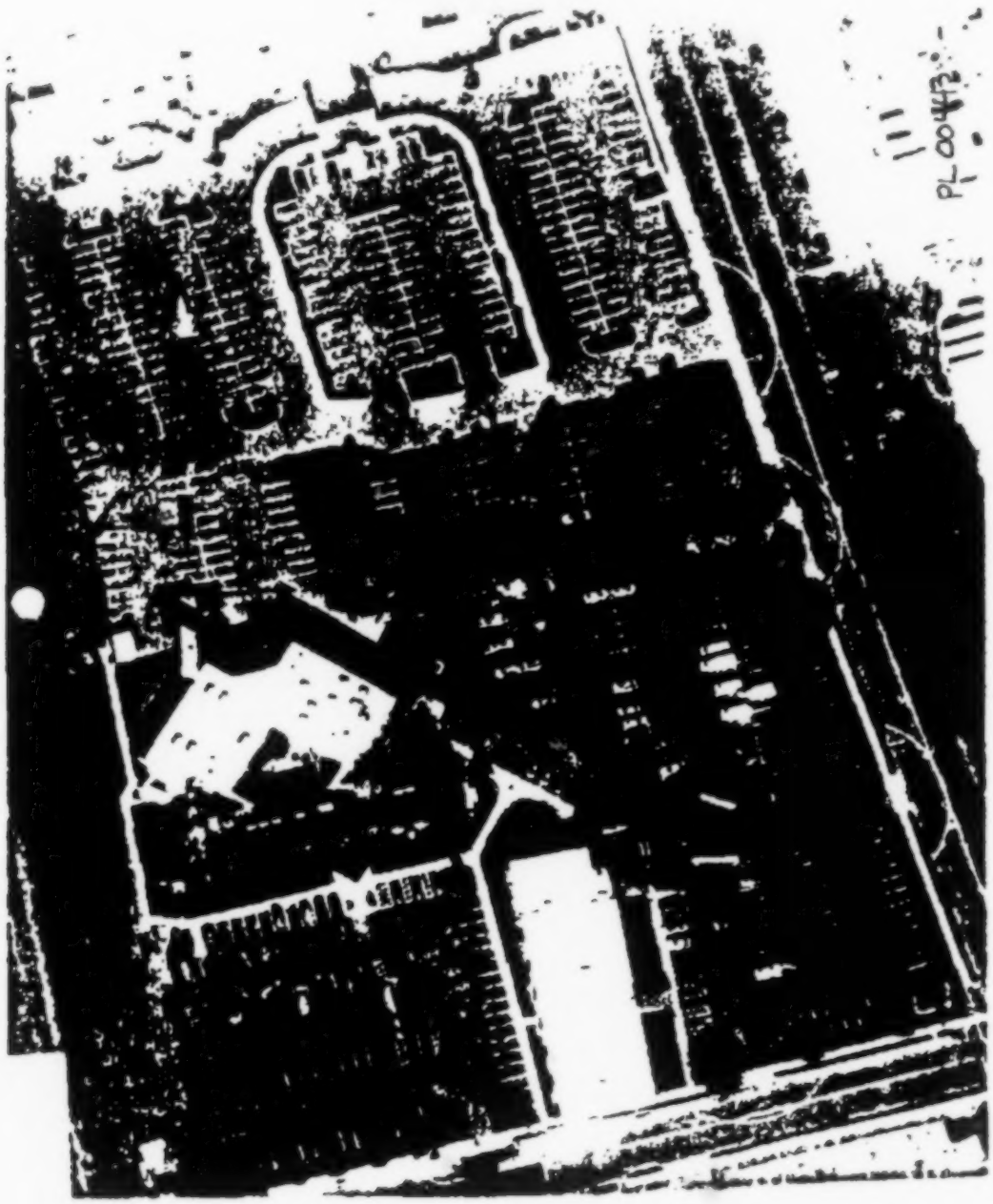


EXHIBIT 6 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-6]

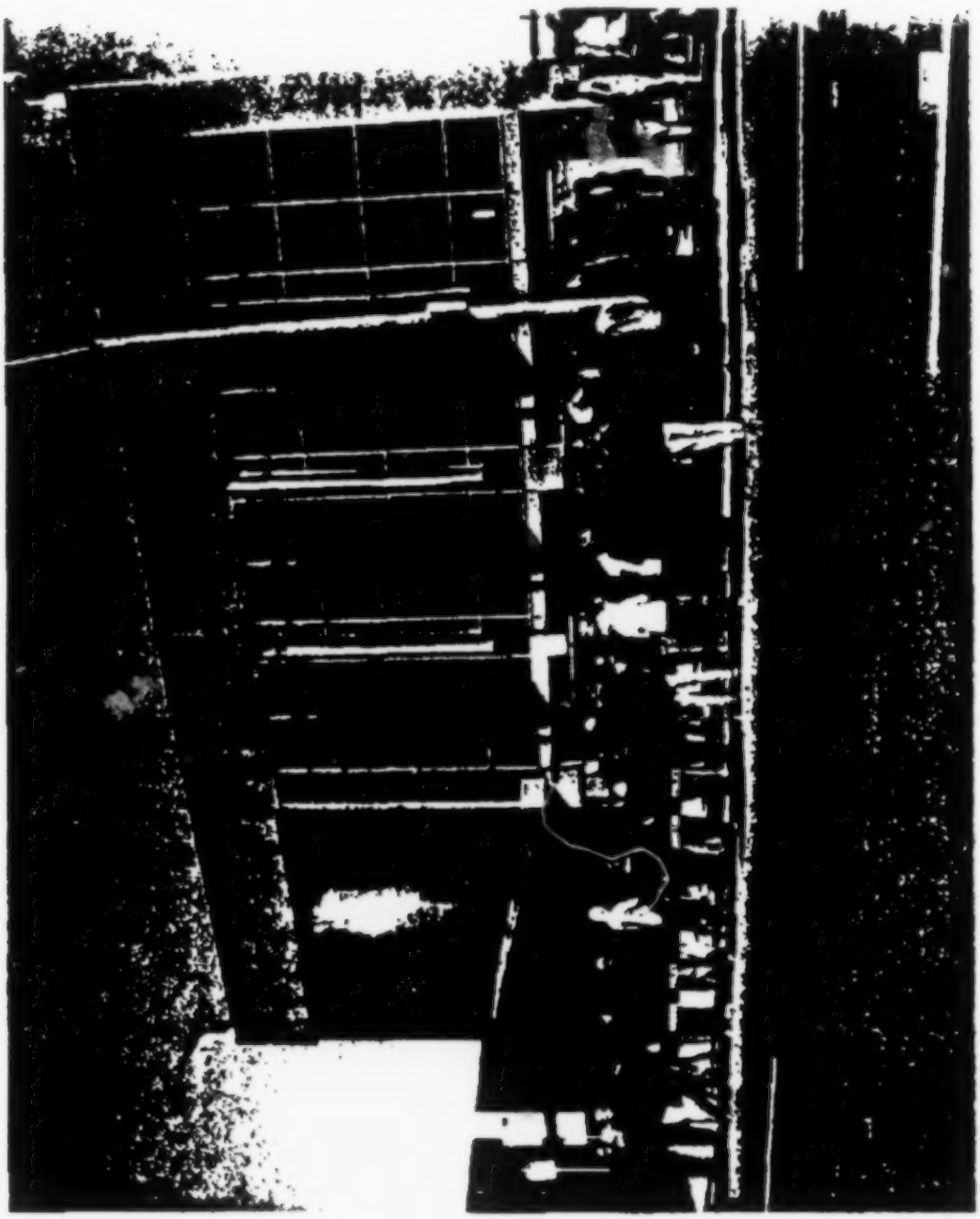


EXHIBIT 7 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-7]

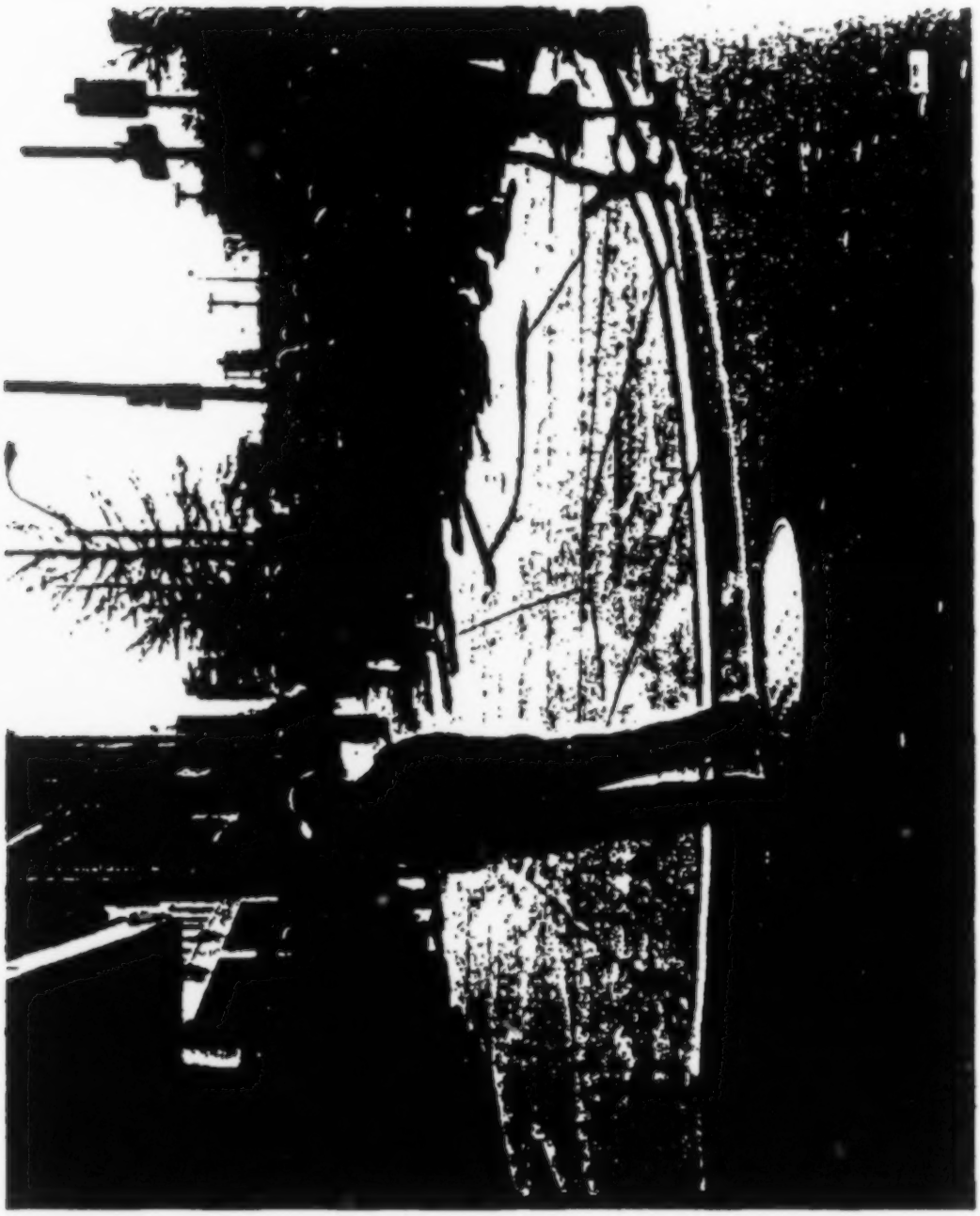


EXHIBIT 8 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-8]

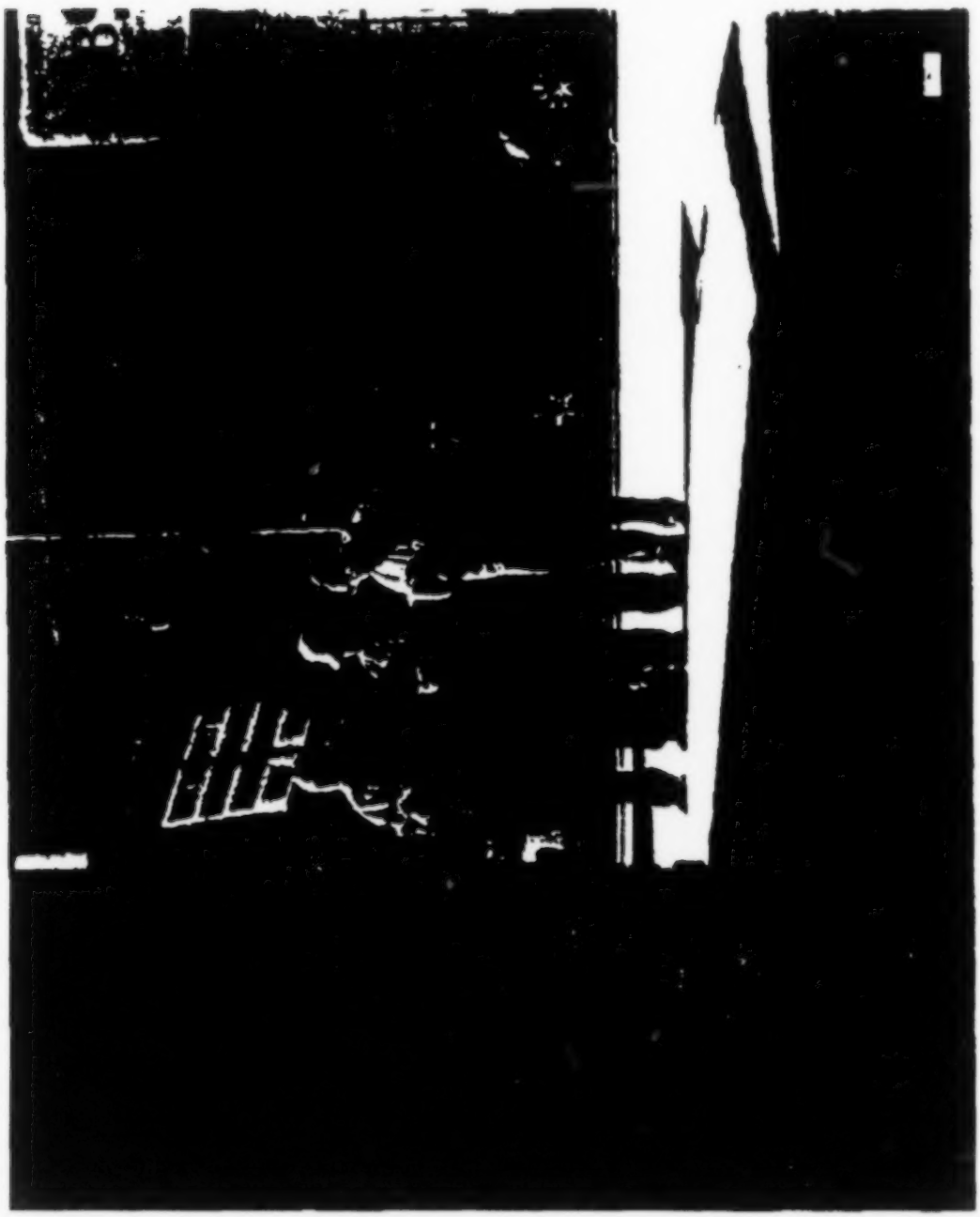


EXHIBIT 9 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-9]

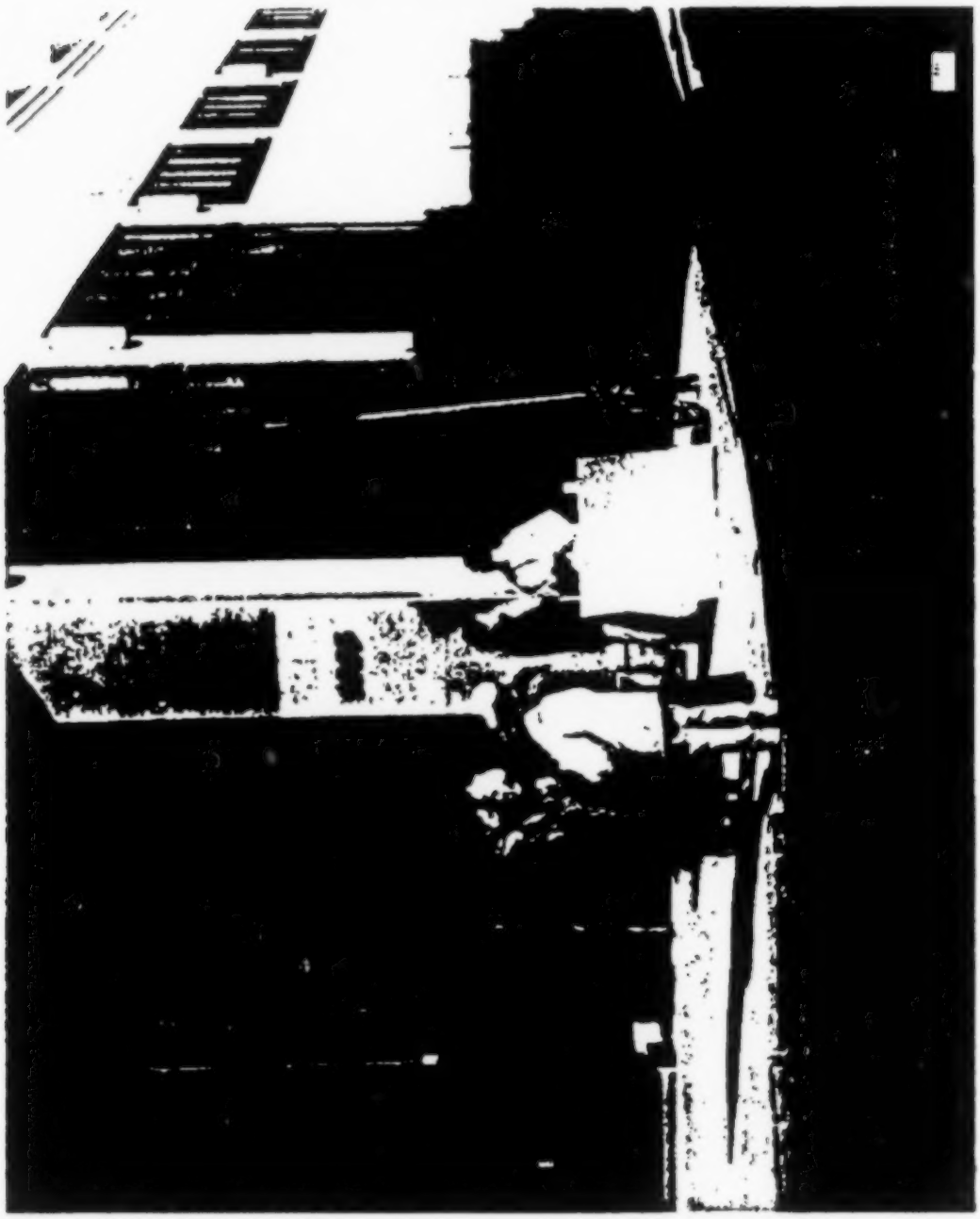


EXHIBIT 10 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-10]

ABORTION ALTERNATIVES

If you are pregnant and have considered abortion, you should know that there are alternatives.

- Free pregnancy tests
- Medical care
- Free baby clothes
- Free baby items

CALL THESE FRIENDLY AND CONFIDENTIAL SERVICES ANYTIME

1 (800) [illegible]
1 (800) [illegible]
1 (800) [illegible]
1 (800) [illegible]

or go to
www.optionline.org

GOOD NEWS

If you have had an abortion, Jesus will forgive you if you ask him. Besides, you are not guilty to blame because

1. You didn't know that
2. The doctor never told you

WOMEN WHO HAD ABORTIONS

If they had children, the women in town how to cope with the realization that she killed her very own baby. They provide social counseling, some known as "Post-Abortion Trauma". There are support groups available for you. The most well known is Project Rachel at 617-783-0010

MORE WOMEN DIE IN LEGAL ABORTIONS

Before abortion was legalized in 1973 only 39 women died from illegal abortion. Today over 600 women die a year from legal abortion. Abortion can be made safe. Some of the safe and legal methods used today, whether, both [illegible] legal, or illegal, are unwittingly, deadly, and even death.

Facts Compiled by Feminists for Women.

DID YOU KNOW

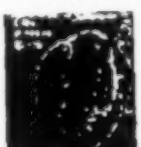
that during the abortion procedure, the doctor rips the arms and legs off the baby while he/she is still alive?

LEGAL FACTS

- [illegible] the U.S. is one of only [illegible] countries that allow abortion after the first trimester.
- A baby is 100% human and [illegible] at 3 months.
- Currently, only [illegible] of pregnant women [illegible] abortion after the first trimester.
- Every day, the [illegible] abortion [illegible] the [illegible] of abortion, etc.

ABORTIONISTS PROFIT OFF THE UNINFORMED

Abortionists don't give patients the information they need because most women would not have an abortion if they were informed of their constitutional rights. Abortionists are making millions off killing their babies. Women have a right to know this important information.



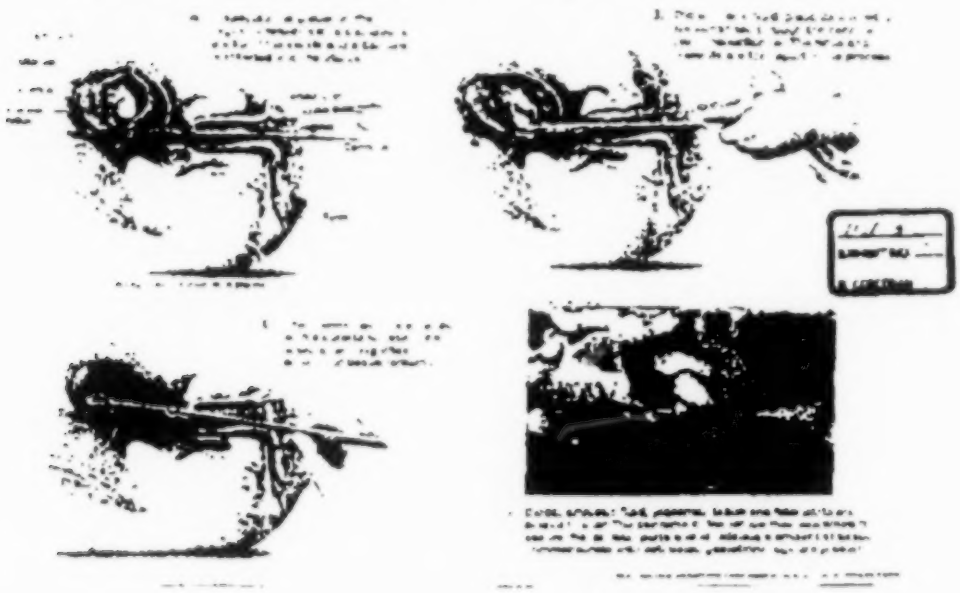
11 weeks. Abortions are performed regularly on babies this size.

Abortions are legal through all nine months of pregnancy, even for non-medical reasons.

EXHIBIT NO. [illegible]
M. CORCORAN

EXHIBIT 12 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-12]

Suction and Curettage Abortion of a 9 Week Old Fetus



Dilation and Evacuation Abortion (D&E) of a 23 Week Old Fetus

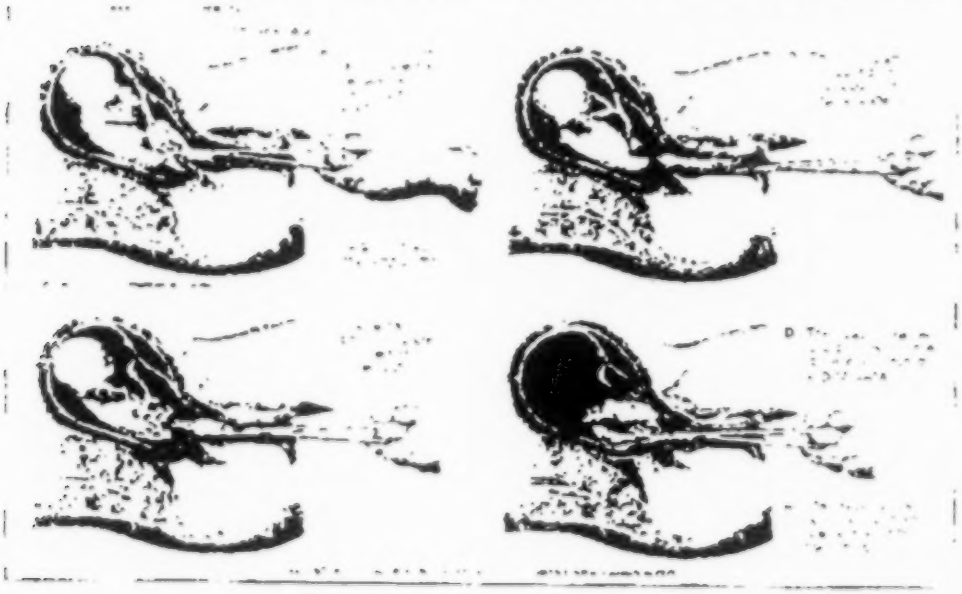
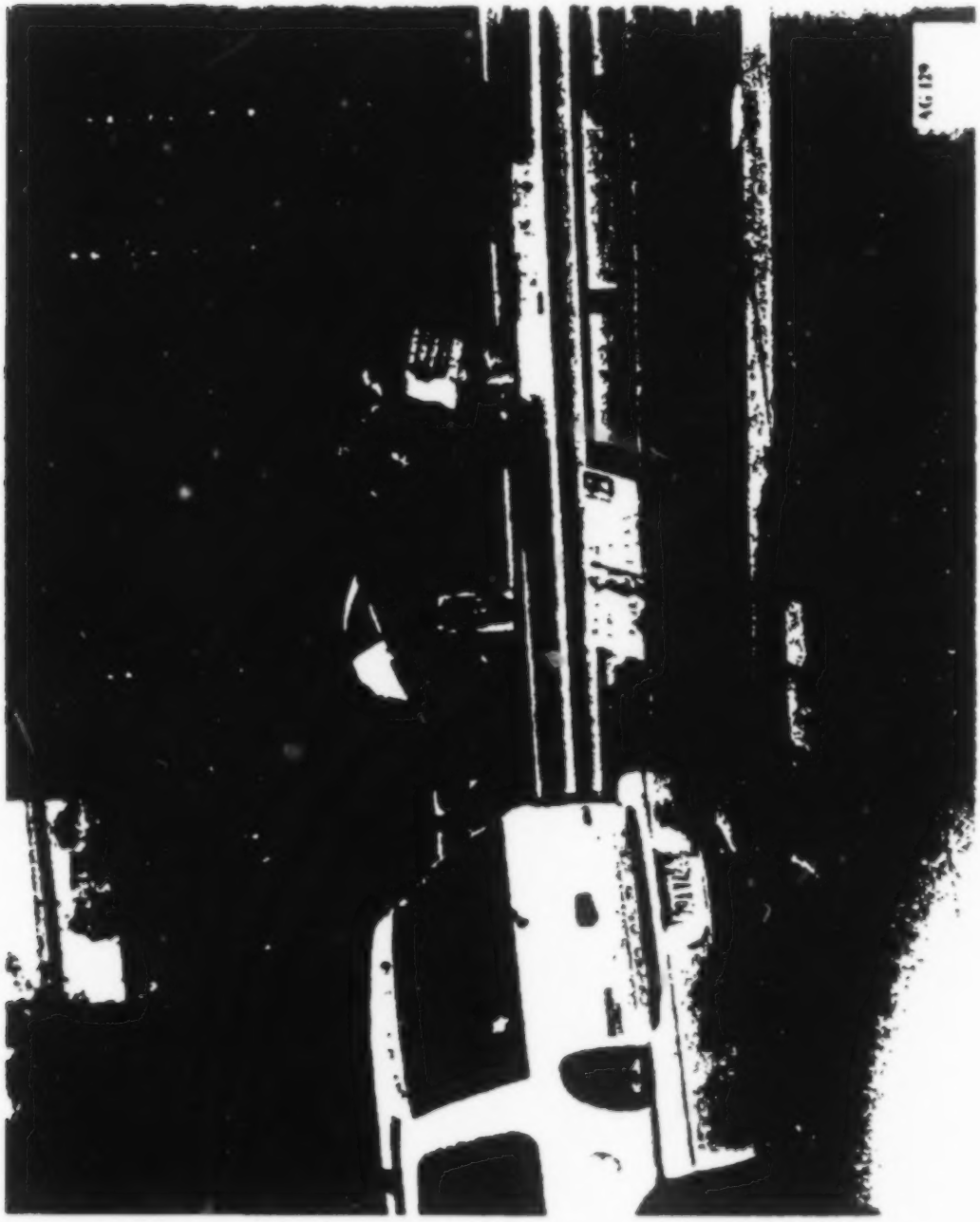


EXHIBIT 14 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-14]

EXHIBIT 17 TO DEPOSITION TESTIMONY OF KRISTEN METZGER [DKT. NO. 138-17]



Do You Think You May Be Pregnant?

Are you feeling frightened?
overwhelmed?
desperate?

How are you going to tell your family?

What are you going to do?

- Our crisis pregnancy center is staffed by experienced lay counselors who care about you and want to help

We know that you are facing possibly the greatest personal crisis of your life

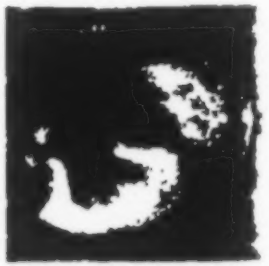
You do not have to face it alone.

All Our Services are Free and Confidential

- Free Pregnancy Tests

  Our hGC pregnancy tests allow you to accurately test for pregnancy within 5 minutes

- Free Ultrasounds when indicated



Actual photo of developing baby approximately 4½ days after conception

- Free Counseling on pregnancy, abortion procedures and alternatives to abortions

Support Services for Women Facing a Crisis Pregnancy

- Housing Referrals

  Appropriate referrals can be made to Housing Assistance Agencies

- Child Care Referrals

- Referrals for Medical Care, Legal Assistance, or other needed services

- Assistance in exploring options for Adoption Placement

- Infant Clothing and other baby necessities available for our clients on Wednesdays only

- Free Post-Abortion Counseling available on a referral basis

EXHIBIT G TO DECLARATION OF MARK BASHOUR
(PL001-002)
[DKT. NO. 145-18]

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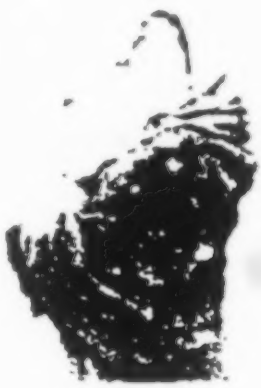

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Location:
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Pregnancy Care Center
152 Northampton Street (Route 10)
Easthampton, MA 01027

Mailing Address:
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EXHIBIT E-4 TO DECLARATION OF CYRIL SHEA (PL105) [DKT. NO. 143-19]

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152 Northampton Street (Route 10)
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[DKT. NO. 139-5]

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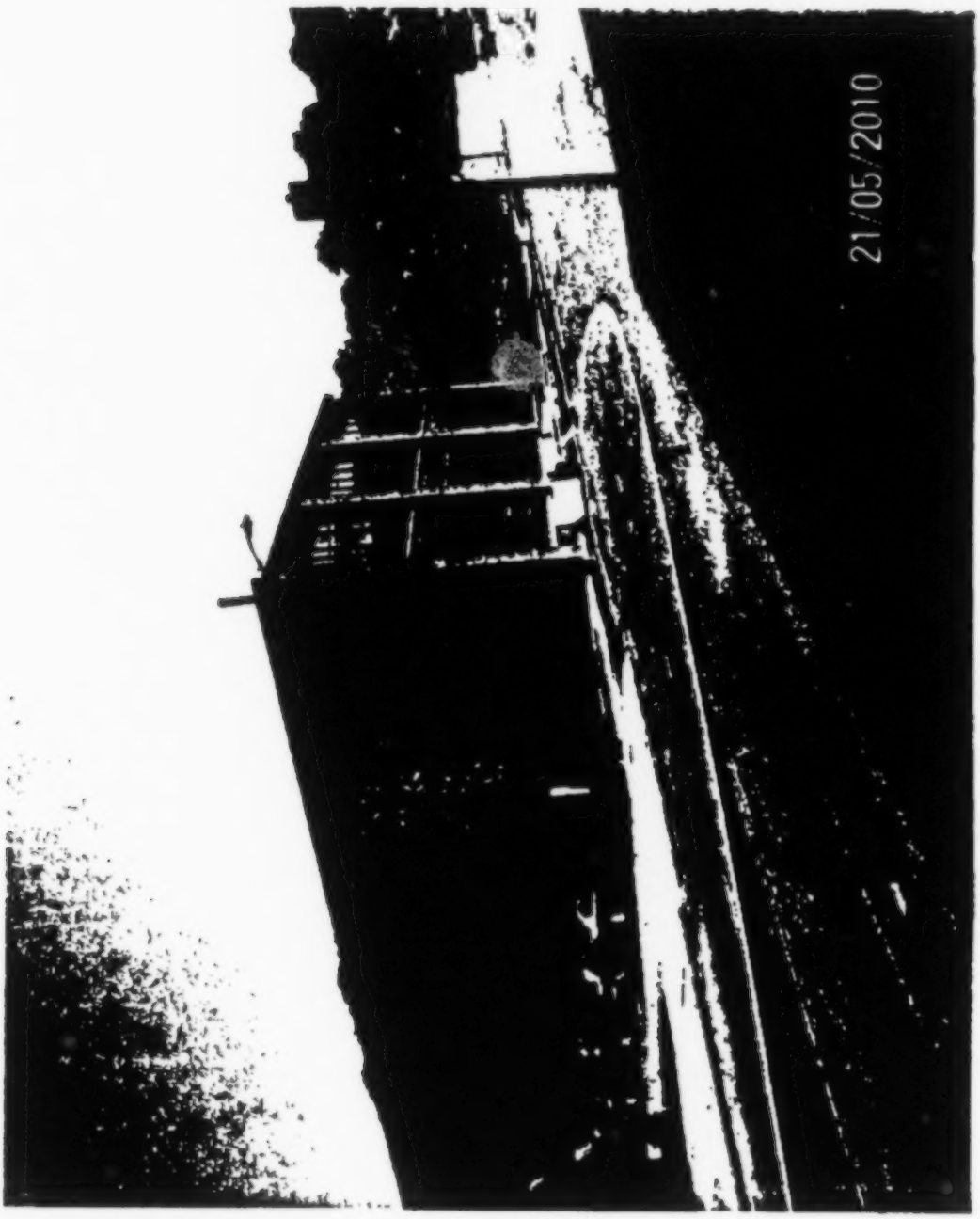
EXHIBIT C-2 TO DECLARATION OF CYRIL SHEA (PL311) [DKT. NO. 143-6]



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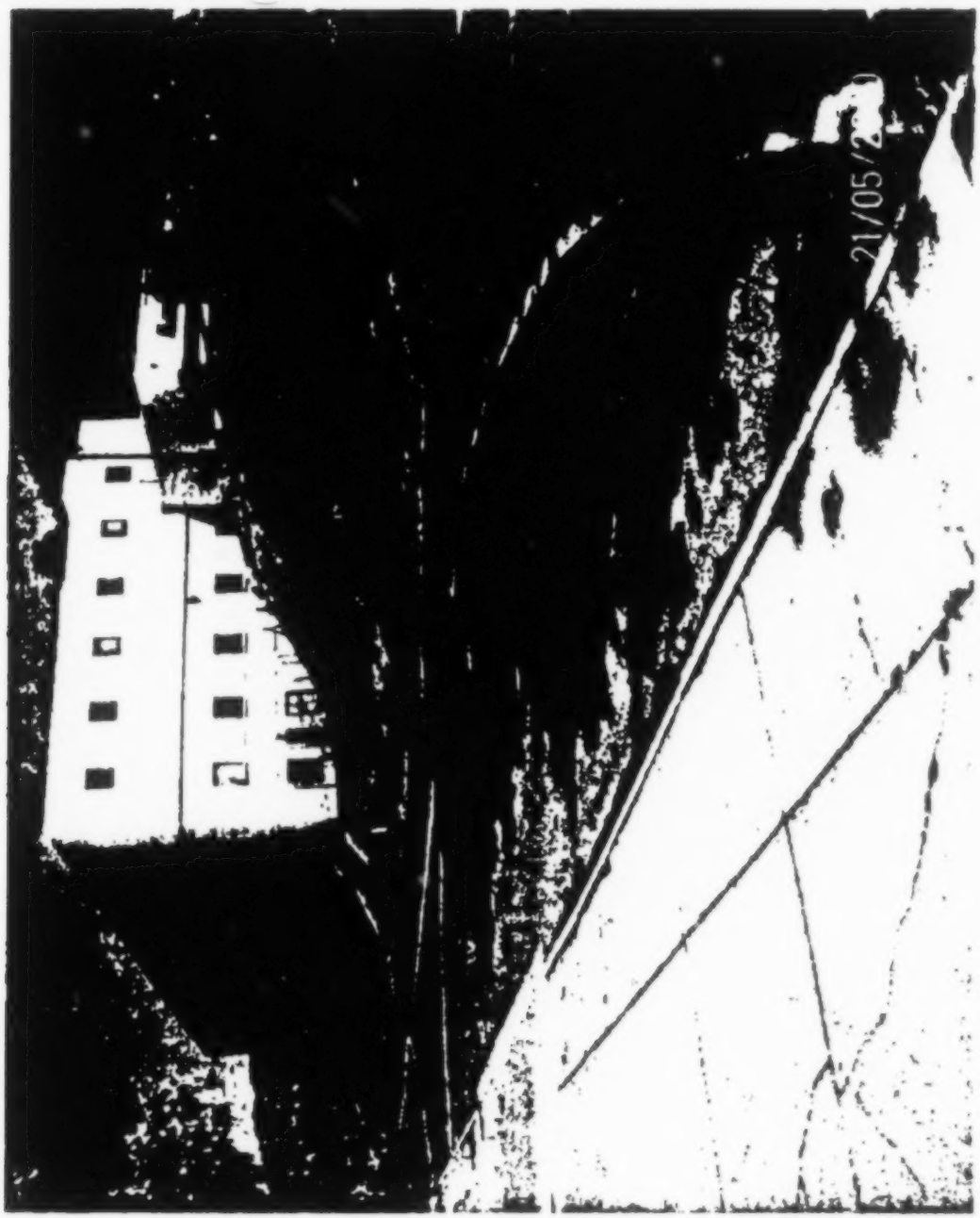
[DKT. NO. 143-10]



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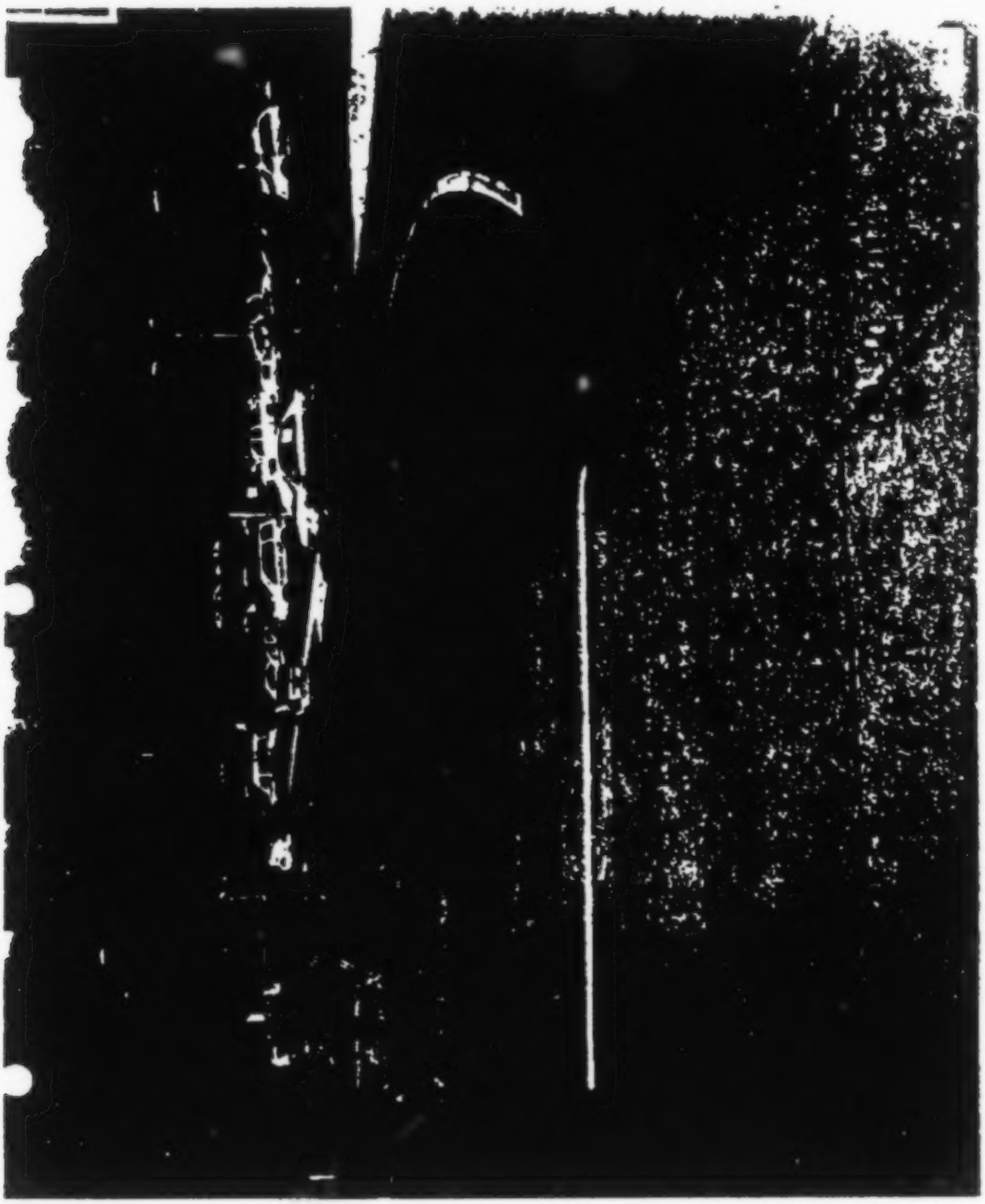

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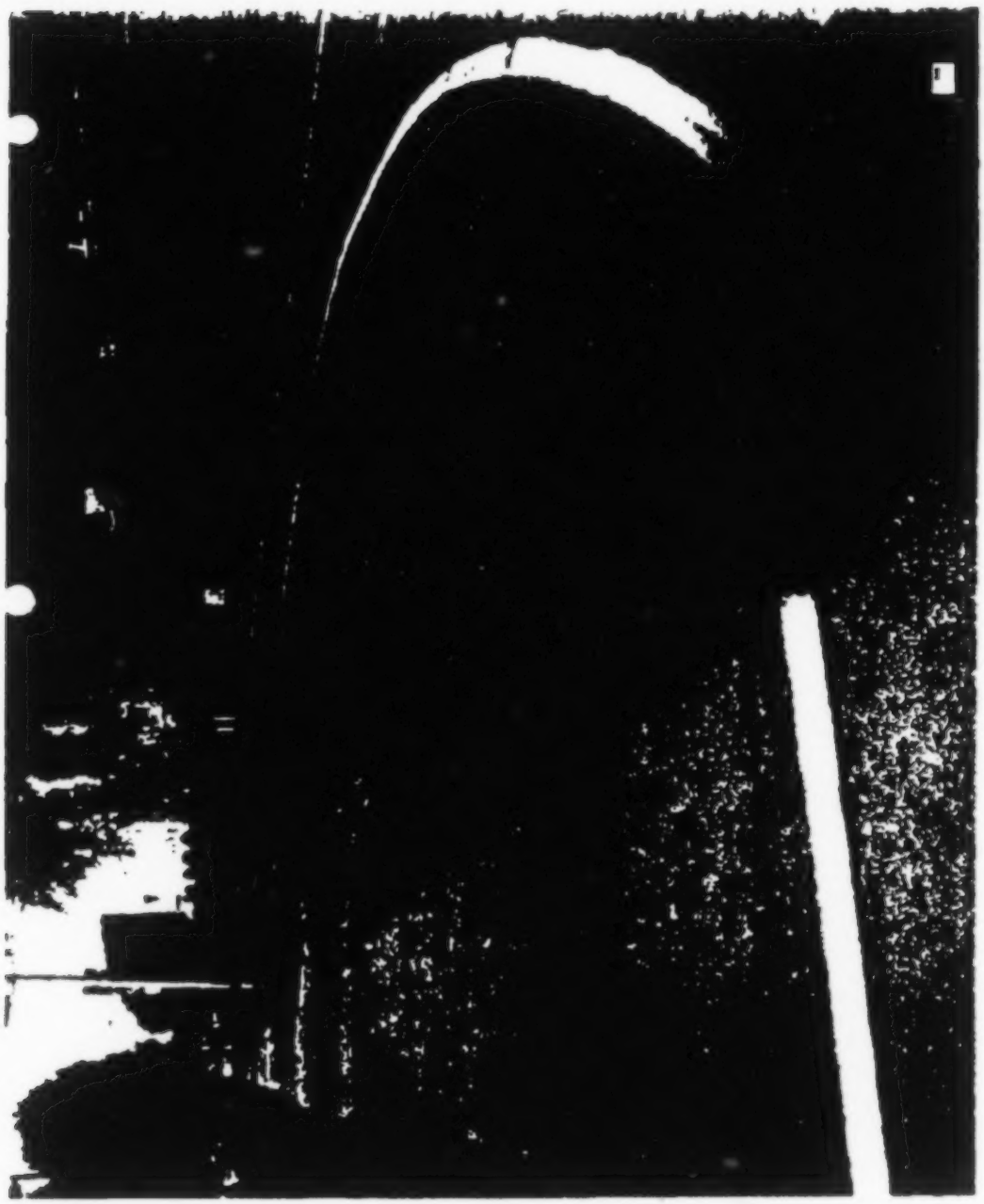

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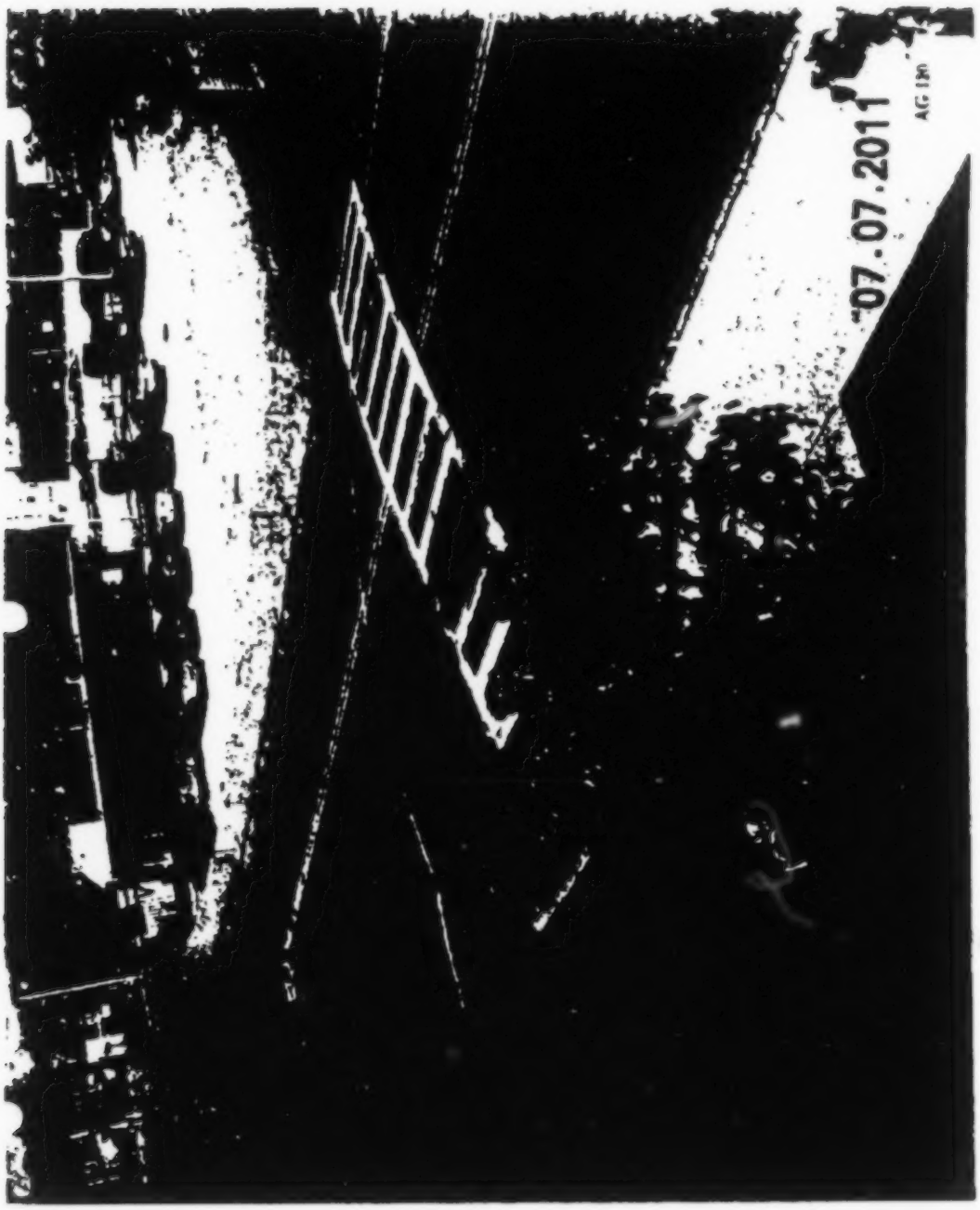

PETITIONER'S BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents ... acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill* v. *Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

PARTIES TO THE PROCEEDING

All petitioners are listed in the caption. Noreen Beebe, Carmel Farrell, and Donald Golden were at one time plaintiffs in the district court but were not parties to the most recent proceeding on appeal.

In addition to respondent Coakley, the appellees below were Daniel F. Conley, in his official capacity as District Attorney for Suffolk County; Joseph D. Early, in his official capacity as District Attorney for Worcester County; and Mark G. Mastroianni, in his official capacity as District Attorney for Hampden County. Michael W. Morrissey, in his official capacity as District Attorney for Norfolk County, was at one point a defendant in the district court but was not a party to the most recent proceeding on appeal.

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
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MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The courts below considered this case in facial and as-applied phases. The opinions of the court of appeals in the facial (Pet. App. 93a-120a) and as-applied (Pet. App. 1a-28a) phases are reported at 571 F.3d 167 and 708 F.3d 1, respectively. The district court's facial (Pet. App. 121a-210a) and as-applied (Pet. App. 28a-66a) opinions are reported at 573 F. Supp. 2d 382 and 844 F. Supp. 2d 206. An interim order of the district court (Pet. App. 67a-91a) is reported at 759 F. Supp. 2d 133.

JURISDICTION

The court of appeals entered its judgment on January 9, 2013. Pet. App. 1a. The petition for a writ of certiorari was filed on March 25, 2013, and granted on June 24, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted at Pet. App. 219a-221a. The most relevant portion of chapter 266, Section 120E½ of the Massachusetts General Laws provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—
>
> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

Petitioners seek to reach women who may be contemplating abortion, in order to offer them information about, and assistance in pursuing, other options. Eleanor McCullen, for example, is a 76-year-old grandmother who aims to stand on public sidewalks near abortion clinics in order to reach this unique audience, at a unique moment, in a compassionate and non-confrontational way. Over the years, hundreds of women have accepted such offers of help from McCullen and the other petitioners.

Since 2007, however, Massachusetts has enforced selective exclusion zones on the public sidewalks outside abortion clinics. While clinic patrons, clinic employees or agents, and passers-by remain free to use the public way, petitioners or other would-be speakers not affiliated with a clinic may not set foot within marked zones extending 35 feet in each direction from any clinic entrance, exit, or driveway. The prohibition applies even to speakers who are entirely peaceful; do not engage in any obstructive or intimidating conduct; and seek only to proffer leaflets, engage in consensual conversations, or even just stand and display a sign or pray.

Massachusetts has consistently defended these abortion-specific, speaker-specific exclusion zones—and a less-sweeping precursor—as permissible time, place, and manner regulations. It has maintained that its law is content-neutral; is narrowly tailored to serve state interests in protecting public safety and clinic access; and leaves ample alternative channels for speech. The First Circuit upheld the law on this basis. Both the State and the courts below have relied heavily on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000).

A. The Prior No-Approach Law

The 2007 Act at issue here replaced an earlier measure, enacted in 2000, that created 18-foot zones around abortion clinic entrances, inside which speakers were prohibited from approaching within 6 feet of a potential listener without consent. The 2000 law was ostensibly designed to address "violence and aggressive behavior" outside clinics, and was modeled in part on the Colorado statute upheld in *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36, 39-40 (1st Cir. 2001) (*McGuire I*).

The statute in *Hill* applied around all healthcare facilities, establishing zones in which speakers were prohibited from "'knowingly approach[ing] another person within eight feet of such person, unless such person consents.'" *Hill*, 530 U.S. at 707 n.1. In sustaining the statute, this Court relied heavily on the fact that it barred only close physical approaches to unwilling listeners, but allowed all other speech. In particular, the Court noted that (i) an 8-foot radius still allowed a speaker to communicate from a "normal conversational distance," and (ii) prohibiting physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 726-727. Observing that the statute applied equally at all healthcare facilities (not just abortion clinics) and to all speakers (not just abortion opponents), the Court held it content- and viewpoint neutral. *Id.* at 725. The Court repeatedly emphasized that the statute forbade only approaches to unwilling listeners, allowing communications with willing listeners to proceed. *See, e.g., id.* at 715-716, 718.

Although Massachusetts modeled its 2000 law on the law upheld in *Hill*, the two were not identical. The Massachusetts law applied only to abortion clinics, not other medical facilities. And it categorically exempted some individuals, including abortion clinic "employees or agents ... acting within the scope of their employment." *McGuire I*, 260 F.3d at 51 (reprinting law).

Despite these differences, the court of appeals concluded in *McGuire I* that "*Hill* controls" and that "through the prism of *Hill*" the 2000 law was a permissible time, place, and manner restriction. 260 F.3d at 39, 43-49; *see also McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*) (upholding 2000 law as applied),

cert. denied, 544 U.S. 974 (2005). The court acknowledged that the law "clearly affect[ed] anti-abortion protestors more than other groups" and that the legislature undoubtedly had targeted "anti-abortion protests." *McGuire I*, 260 F.3d at 44. But it concluded, based on *Hill*, that this "special treatment" and "targeting" corresponded to the "legitimate legislative purpose" of "combating violence at [abortion clinics]." *Id.* at 44 & n.1.

As to the categorical exception allowing clinic employees to approach listeners without consent, the court recognized "a certain logic" to the challengers' view that the exception had "the sole practical purpose of ... promot[ing] a particular side of the abortion debate." *McGuire I*, 260 F.3d at 46. Yet, relying on *Hill*, the court asserted that such differential treatment was permissible as long as the reason for it was not "content-based" and could be "rationally explained." *Id.* at 44. The court could "envision at least one legitimate reason" for the exemption, which was "to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution." *Id.* at 47. The court also reasoned, relying again on *Hill*, that "the legislature rationally could have concluded that clinic employees are less likely to engage in directing unwanted speech toward captive listeners." *Id.* at 46 (citing *Hill*, 530 U.S. at 715-717).

B. The Current Act

In 2007, Massachusetts replaced the 2000 law with the Act at issue here—Mass. Gen. Laws ch. 266, § 120E½(b). The Act dispenses with any effort to target only unwanted physical approaches. Instead, it creates large painted zones on public sidewalks near abortion clinics in which traditionally protected

speech—even consensual conversation or silent prayer—is forbidden. Like its predecessor, the Act applies only when and where abortions are performed, and categorically exempts clinic employees acting "within the scope of their employment."

Although styled as an "emergency" measure (Pet. App. 153a), the Act was adopted despite a complete lack of evidence that, from 2000 to 2007, there had been a single conviction under the 2000 law; a single conviction for conduct outside a Massachusetts abortion clinic under any of the various federal and state laws that directly target violence, obstruction, intimidation, trespass, or harassment; or any alleged problem whatsoever outside clinics in Worcester and Springfield, two of the three locations at issue here.

Law enforcement officials claimed in testimony before the legislature that protestors outside clinics were "breaking the [no-approach] law on a routine basis." JA 78. Attorney General Coakley displayed to legislators a video that she said showed "clear" violations of the act. *See id.* ("Here are workers for the clinic who clearly are approached,–are touched. That's clearly against the law[.]"). There is no evidence in the record that those "clear" violations were ever prosecuted. Indeed, law enforcement officials could point to only a handful of arrests and a few prosecutions that were dismissed for violating the First Amendment. *See* JA 68-69.[1] The same officials complained that it was hard

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[1] The bases for these arrests are unclear (JA 69), although, during this litigation, one law enforcement official noted that most involved statutes other than the no-approach law. *See* JA 123. The same official had previously testified, in *McGuire*, that the police "tr[ied] not to arrest anyone" under the no-approach law and did not "take [a] strict interpretation as far as enforcing it." JA 29-30.

to determine whether a particular approach was in fact a violation of the law. JA 79; *see also* JA 67 (police have to work like "basketball referee[s]" to monitor the floating 6-foot zone). Police officials remarked that a 35-foot zone "where no protesters can go ... would be great ... [and] would make our job so much easier." JA 68.

The legislature decided to amend the law over the objection of, among others, the American Civil Liberties Union of Massachusetts and the Defending Dissent Foundation. JA 38-40, 64-66. As amended, the Act (reprinted at Pet. App. 219a-221a) establishes zones on public streets and sidewalks extending 35 feet in all directions from each "entrance, exit or driveway of a reproductive health care facility." Mass. Gen. Laws ch. 266, § 120E½(b). In practice, these zones have been implemented by large painted semi-circles around each entrance to a clinic. *See, e.g.*, Pet. App. 211a-218a. The Act generally makes it illegal for a person to "enter or remain" within this zone unless going to or from a clinic or solely passing through. Mass. Gen. Laws ch. 266, § 120E½(b)(1), (4). The Act provides for prison terms of up to 30 months and criminal fines of up to $5,000. *Id.* § 120E½(d).

The Act thus makes stationary speech, leafleting, consensual conversation, and prayer a crime on otherwise-open public streets and sidewalks. As a practical matter, the Act primarily, if not exclusively, affects anti-abortion speakers. Like its 2000 predecessor, and unlike the Colorado law sustained by this Court in *Hill*, the Act applies only at abortion clinics—*i.e.*, non-hospital locations "where abortions are offered or performed." Mass. Gen. Laws ch. 266, § 120E½(a). And, unlike the law in *Hill*, the Act again specifically exempts from its prohibitions all "employees or agents of

[a clinic] acting within the scope of their employment." *Id.* § 120E½(b)(2).

Finally, unlike the law in *Hill*, the Act prohibits non-exempt speakers from entering the zones to offer leaflets, display signs, or speak or offer to speak with others at normal conversational distances. Unless exempt, speakers are barred from standing in place in a non-obstructive way on public sidewalks inside the zone. *Compare Hill*, 530 U.S. at 726-727. It is a crime to enter the zone even to continue a quiet conversation with a willing listener.

C. Effect Of The Act On Petitioners

Petitioners are individuals who, prior to the Act, regularly stationed themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. Petitioners testified that they try to engage women who may be seeking abortions in close, kind, personal communication, with calm voices, caring demeanor, and eye contact. They explained that this kind of communication, which they refer to as "counseling" or "sidewalk counseling," is essential to their ability to convey a message of compassion and support. *See, e.g.*, JA 162, 248. They testified, without rebuttal, about hundreds of women who had previously accepted such offers of help on sidewalks outside abortion clinics. And they testified, again without rebuttal, that application of the Act to their activities at specific locations in Boston, Worcester, and Springfield severely restricts their ability to communicate this message effectively to the audience they feel they need to reach most: individuals contemplating an abortion who might welcome information about alternatives and practical assistance in pursuing them.

Eleanor McCullen offers help to women outside of a Boston Planned Parenthood clinic on Tuesdays and Wednesdays. JA 131-132. She has never been arrested or threatened with arrest. *McCullen II* CAJA 217. She and her husband have spent over $50,000 of their own money to help women effectuate their choice to avoid abortion. That money has paid for baby showers, living quarters, furniture, heating oil, electricity, water, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else women needed. JA 132. In McCullen's experience, it is, as a practical matter, impossible to make women aware that such help is available without close personal contact and an opportunity for confidential discussion. *Id.*

The other petitioners are similarly dedicated to sidewalk counseling, advocacy of abortion alternatives, or peaceful expression of moral opposition to abortion. Jean Zarrella is an 85-year-old grandmother who offers counseling on Saturdays and some Wednesdays at the same clinic in Boston as McCullen. JA 175. Gregory Smith is a 77-year-old grandfather who prays the rosary in front of the Boston clinic on Saturday mornings. JA 188-189. Eric Cadin, a Catholic priest, also prays outside the Boston clinic, in addition to offering information and counseling. JA 161-162, 168.[2] Mark Bashour, a community college professor of history, has been offering counseling outside a clinic in Worcester, Massachusetts, twice a week for over twenty years. JA 247. Nancy Clark too counsels outside the Worcester clinic. JA 214-215. Finally, Dr. Cyril Shea is an 84-year-old retired orthopedic surgeon who stands twice a week outside a third facility, in Springfield, Massachusetts,

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[2] Father Cadin was a seminarian during the district court proceedings (JA 161) but was ordained in 2012.

holding a sign expressing moral opposition to abortion; he too distributes literature and offers to counsel clinic patrons about abortion alternatives. JA 196, 198, 200.

Petitioners have good reason to believe that some women entering these clinics would welcome their offers of information and help, and would ultimately find petitioners' assistance valuable in making a difficult decision. For example, many women with whom McCullen has spoken have told her that they do not want an abortion but feel that they have no alternative. JA 132-133. Academic studies confirm that some women seek abortions for reasons that may make them receptive to information about alternatives—for example, because they feel they cannot afford a baby or are being pressured by others. *See* Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 113 (2005) (reasons given for abortion: "Can't afford a baby now" [73%]; "Not sure about relationship" [19%]; "Husband or partner wants me to have an abortion" [14%]); *cf. Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 882-883 (1992) (information about abortion and child-support "ensure[s] an informed choice" and helps "reduce[] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed").

Petitioners testified, however, that to be effective, their message must be conveyed in a friendly, gentle manner, with eye contact, at normal volume. JA 133, 176.[3] Shouting from a distance is ineffective or counter-

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[3] McCullen typically initiates a sidewalk conversation by asking "Good morning, may I help you this morning?" or "Good morning, may I give you my literature? Is there anything I can do for

productive. *E.g.*, JA 133 (McCullen's experience that speaking from more than "a normal conversational distance of ... six to eight feet" can "alarm" listeners or "make them uncomfortable"). As Clark explained, the buffer zone requires "yelling as loud as [she] can" from 35 feet or more away, which "completely ruins" her message by undercutting her compassionate tone. JA 244. Unsurprisingly, people do not respond well to being yelled at from across the street. *Id.*

One of the State's witnesses confirmed that, in her investigations at abortion clinics, she observed only one person respond to attempts at communication: a young woman with whom counselors spoke at close range and with eye contact. JA 284-286. When the only available communication was a pro-life sign or shouting from a distance, people just "walked on by." *Id.* at 285.

Likewise, most people will not make an effort to accept proffered literature unless it can be placed near their hands. JA 179. Such leafleting is an integral part of petitioners' efforts to provide information about alternatives to abortion. *E.g.*, JA 315-316 (flyer for A Woman's Concern Pregnancy Resource Centers: "The decision you are about to make deserves careful consideration and understanding of all options available to you. We recognize that there are no easy solutions, and no one answer that is right for everyone. Call, come in, and together let's explore your situation."); *see also* JA 311-314 (other leaflets). Several petitioners testified that distributing Spanish-language literature is especially important because they do not themselves speak

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you? I'm available if you have any questions." JA 138. If the listener shows interest, she continues: "Perhaps we can talk a little bit before you rush into anything here, let's just talk a couple of minutes.... [T]here is help available." *Id.*

Spanish and thus have no other means of communication with individuals who speak only Spanish. JA 200, 218, 252; *see also* JA 314 (example leaflet).

These problems cannot be ameliorated by distributing leaflets or conversing at normal volumes outside the exclusion zones. By keeping petitioners at least 35 feet from all entry points, the Act prevents petitioners from distinguishing between their intended audience—those headed into clinics—and mere passers-by. JA 135, 179. McCullen testified that even when she recognizes that a woman approaching from the opposite side of the zone is heading for the clinic, she often cannot circumnavigate the zone quickly enough to try to begin a conversation or offer literature near the woman's hands outside the zone. JA 134, 154-155. In some areas, the zones effectively encompass the entire public sidewalk, making it impossible even to stand at the edge of the zone.[4] Finally, the Act forces any conversa-

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[4] In Boston, for example, the exclusion zone includes all but one foot of the public sidewalk and on one side extends four feet into the street. JA 294. Petitioners presented similar evidence regarding clinics in Worcester and Springfield. In Worcester, zones around the clinic's pedestrian and driveway entrances both extend far into the street. JA 295-296. Clark and Bashour are forced to stand behind a fence 75-100 feet away from the clinic doorway, or 35 feet away from the driveway entrance that the vast majority of clinic patrons use to enter the facility's private parking lot. JA 218-219, 251. One of the zones at the Springfield clinic similarly prohibits Dr. Shea from standing or distributing literature on the public sidewalk next to the driveway entrance used by most patrons. JA 200, 297-298. Photographs of the painted exclusions in Boston are reproduced at Pet. App. 211a-213a. *See also* Pet. App. 214a-216a, JA 321 (Worcester); Pet. App. 217a-218a, JA 317-320 (Springfield). The precise contours of the zones—some longer than 80 feet, when the 35-foot buffer is added to both sides of the clinic driveway or entrance—are set forth in stipulations at JA 293-299.

tion that may be initiated outside the zone to stop at the boundary line of the zone, lest the speaker risk criminal prosecution. Being forced to stop, mid-conversation, at the edge of the zone makes speakers like petitioners appear "untrustworthy." JA 135, 251. McCullen explained, for example, that she faces a choice at the edge of the zone of either stopping to explain that she cannot enter the zone, which makes her appear "suspicious" ("Who is this person if she can't go further[?]"), or raising her voice to continue the conversation at a distance, which "comes across as not caring." JA 152-153.

Meanwhile, clinic employees or agents are free to remain in the zone and to approach and speak with anyone within it. Clinics regularly station "escorts" in the exclusion zones, wearing blue Planned Parenthood vests. JA 177; *see also* Pet. App. 211a (photo). The escorts use their statutory exemption to interfere with petitioners' attempts to communicate. For example, escorts surround and walk with women approaching the clinic, sometimes yelling, making noise, chattering and/or talking loudly, saying things such as "you don't have to listen to" her, "don't pay any attention to" her, "don't listen to" her, or she is "crazy." JA 178. Escorts also raise and lower their arms to prevent petitioners from offering literature near the hands of recipients. JA 165. And escorts, unlike petitioners, need not stop at the buffer zone line; if they approach a person who has been engaged by a sidewalk counselor outside of the zone—as they are instructed to do by their employer (*McCullen II* CAJA 490)—they can freely accompany the person and continue talking while moving through the zone. JA 178, 189-190.

These constraints have significantly burdened petitioners' counseling efforts. For example, Zarrella testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction with an incoming woman since the Act took effect—after approximately 100 successful interactions before the Act. JA 180. McCullen testified that although she continues to help some women with whom she is able to speak (JA 148), the Act has drastically reduced the number of such conversations. In her estimate, the Act prevents her from speaking at all with at least 5-6 people per day of outreach activity, or 480-586 people per year. JA 136-137. Even when she is able to make initial contact, McCullen testified that the Act's restrictions change the nature of her conversations, making them shorter and less effective because she is forced to speak hurriedly, sometimes speak louder, and stop walking at the painted exclusion line. *See* JA 137 ("I reach far fewer people under the new buffer law than I did under the old [no-approach] law.").

The impact at Worcester and Springfield is equally severe. Most patients arrive at these clinics by car and park in the clinic's parking lot. JA 249 (85-90% in Worcester); JA 200 (90% in Springfield). This means that petitioners' only chance to reach this audience is to stand on the public sidewalk next to the driveway and offer leaflets. *E.g.*, JA 244-245, 252-253. Now that they are forced 35 feet away from that driveway—and cannot hand even a willing recipient a leaflet through the window—virtually no one arriving by car ever accepts their literature. JA 213, 218, 252. Handing out literature to people arriving by foot is equally ineffective in light of the zones: Petitioners rarely hand out more

than one piece of literature per week, and can almost never begin a conversation. JA 218, 225, 252, 261.

D. Prior Proceedings

Petitioners brought suit to enjoin enforcement of the Act under the First and Fourteenth Amendments in January 2008. JA 1.

Less than two weeks later, Attorney General Coakley's Office sent a letter to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the Act. JA 92. The "guidance" indicated that, despite the Act's facially absolute exemption, clinic employees and agents acting within the scope of their employment were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." JA 93. Similarly, the guidance instructed that persons crossing through the zone as mere passers-by were criminally prohibited from "expressing their views about abortion or engaging in other partisan speech." JA 93-94.

1. The district court bifurcated the proceeding, first addressing petitioners' facial challenge and request for preliminary relief. The court held a bench trial on a stipulated record and in August 2008 upheld the Act on its face as a content-neutral time, place, and manner regulation. Pet. App. 121a-210a.

The court of appeals affirmed. Pet. App. 93a-120a (*McCullen I*). It regarded its own prior *McGuire* decisions as controlling on two threshold issues of neutrality, despite differences from the prior law. First, the court reasoned that objections to the Act's exclusive focus on abortion clinics (as opposed to all health care facilities) had been addressed and rejected in the

McGuire cases. *Id.* 105a (citing *McGuire I*, 260 F.3d at 44-47, and *McGuire II*, 386 F.3d at 56-59). Second, the court reasoned that any challenge to the Act's categorical exemption for clinic employees also had been "squarely repulsed" in *McGuire I*. *Id.* (citing 260 F.3d at 45-47).

The court further concluded that, on its face, the Act was narrowly tailored, not overbroad, and left ample alternative channels of communication. Pet. App. 108a-112a. Dismissing petitioners' objection that the Act outlaws peaceful leafleting on public sidewalks and restricts petitioners from speaking to willing listeners at the "conversational distance" discussed in *Hill*, the court reasoned that "the Constitution neither recognizes nor gives special protection to any particular conversational distance" and that "handbilling is not specially protected." *Id.* 110a. It relied on *Hill* for the proposition that time, place, and manner restrictions "routinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels, the court held that "as long as [the court could] envision circumstances in which a 35-foot buffer zone allow[ed] adequate alternative means of expression, [a facial] challenge must fail." Pet. App. 111a. The court saw ample alternative channels because petitioners could stay outside the zones to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and "[a]ny willing listener [was] at liberty to leave the zone [and] approach those outside it." *Id.*

2. On remand, the district court permitted petitioners to advance only a claim that the Act, as applied, did not leave petitioners with adequate alternative means of communication. Pet. App. 88a. As to that issue, the court permitted discovery and then held a bench trial based on written testimony and factual submissions from the parties. In February 2012, the district court again upheld the Act. *Id.* 65a-66a.

The court of appeals affirmed. Pet. App. 1a-28a.

First, the court rejected petitioners' request to revisit its previous rulings that the Act is content- and viewpoint-neutral and constitutional on its face. Pet. App. 9a-14a. In the court of appeals' view, nothing in this Court's recent First Amendment cases involved any "retreat from [the Court's] well-settled abortion clinic/buffer zone jurisprudence." *Id.* 12a (citing *Hill* and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

Next, the court sustained the grant of judgment on the pleadings as to most of petitioners' as-applied claims. Pet. App. 14a-20a. In that regard, the court, among other points, reiterated its holding that the Act is "viewpoint-neutral" despite its exemption for clinic employees and agents. *Id.* 15a. The court asserted, without explanation, that the exemption—which states that the Act "shall not apply" to "employees or agents of such facility acting within the scope of their employment," Mass. Gen. Laws ch. 266, § 120E½(b)(2)—"does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." Pet. App. 15a.

Finally, the court affirmed the rejection of petitioners' as-applied challenge. Pet. App. 20a-26a. The court viewed the "pivotal question" as "whether the Act, as

applied, leaves open adequate alternative means of communication." *Id.* 22a. The court acknowledged that the Act "curtails [petitioners'] ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," *id.* 23a, relegating them instead to "shorter, louder, and less personal exchanges," *id.* 22a. The court thought this difference insignificant, however, because petitioners could leave the zones to engage in "oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups." *Id.* 23a, 26a.

SUMMARY OF ARGUMENT

Massachusetts' 2007 Act is not a permissible time, place, and manner regulation. Such restrictions can be sustained only if they are content- and viewpoint-neutral; are narrowly tailored to serve significant government interests; and leave open ample alternative channels for communication. Massachusetts' Act fails each aspect of this test. Expressly designed to go beyond the law sustained in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the Act discards each of the safeguards that this Court carefully considered and relied on in that case.

The Act is not content-neutral because it creates speech exclusion zones only at abortion clinics and, as a practical matter, affects speech on only one controversial issue—abortion. In contrast, *Hill* emphasized that Colorado's statute could be viewed as neutral "precisely because" Colorado had made a "general policy choice" to regulate speech equally at all healthcare facilities. 530 U.S. at 713.

The Act is also impermissibly viewpoint-based. It exempts abortion-clinic employees and agents from the prohibition on entry into the exclusion zones. *Hill*, in contrast, emphasized that the Colorado statute applied "to all demonstrators whether or not the demonstration concerns abortion and whether they oppose or support ... an abortion decision. *That is the level of neutrality that the Constitution demands.*" 530 U.S. at 725 (emphasis added).

Massachusetts also cannot show that the Act is narrowly tailored. Legitimate interests in safety and access are already amply served by other laws. The Act unnecessarily bans petitioners and others from entering parts of otherwise public sidewalks to leaflet or conduct (or even continue) consensual conversations with willing listeners. In contrast, *Hill* emphasized that Colorado had sought to regulate only close physical approaches to unwilling listeners.

Finally, the Act does not leave open ample alternative channels for communication. Petitioners seek to offer women information and assistance in pursuing alternatives to abortion. They testified without contradiction that these messages can be effectively conveyed only through personal communication, from a conversational distance, with a calm voice, caring demeanor, and eye contact. The alternative means of communication suggested by the court of appeals—standing outside the exclusion zones and shouting, using bullhorns, or waving large signs—are not remotely adequate substitutes. The Act leaves open none of the alternative channels specifically relied upon by *Hill*, including the ability to speak with listeners or proffer literature from a "normal conversational distance." 530 U.S. at 726-727.

This Court should, at a minimum, hold that the Act goes well beyond the outer limit marked by *Hill* on government power to criminalize peaceful, non-obstructive speech on public sidewalks. Alternatively, the Court may wish to consider whether *Hill* should be substantially clarified, narrowed, or overruled.

ARGUMENT

I. THE ACT IS NOT A PERMISSIBLE TIME, PLACE, AND MANNER REGULATION

Public sidewalks, including those outside abortion clinics, are quintessential public forums. "[T]ime out of mind," such areas "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *United States* v. *Kokinda*, 497 U.S. 720, 743 (1990) (quoting *Hague* v. *Committee for Indus. Orgs.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

The ability of speakers to engage in such activities, including through leafleting or by asking others if they are willing to stop and converse, has been jealously protected by this Court. *See, e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940). So has the right of listeners to receive proffers of speech, which have substantial value not just to the speaker but to the listener and the community. *See, e.g.*, *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

The government's ability to restrict speech on public sidewalks is therefore "very limited." *United States* v. *Grace*, 461 U.S. 171, 177 (1983). Of course, it may prohibit abusive conduct—violence, intimidation, or obstruction. And it may impose reasonable restrictions on the time, place, and manner of even public-forum

speech. *See, e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Such restrictions are, however, subject to significant constitutional scrutiny. They will be sustained only if they are content- and viewpoint-neutral; are narrowly tailored to serve significant government interests; and leave affected speakers with ample alternative channels to communicate their message. *Id.* The government bears the burden of proving the constitutionality of speech restrictions. *See Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989); *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000).

The Act fails each aspect of this test. Expressly designed to go beyond the law sustained in *Hill* v. *Colorado*, it discards each of the safeguards carefully relied on in that case. Applying only outside abortion clinics, it turns the traditional free-speech zone of public sidewalks into a speech-free zone—or, more precisely, a zone open to clinic speakers, but closed to speech offering alternatives. Defended as necessary to prevent violence and obstruction, it bars entry even for wholly peaceful, non-obstructive speech with willing listeners. And far from leaving these petitioners with ample alternative means of communication, the Act severely burdens their ability to reach a unique audience in the only way that is effectively adapted to their message of calm, compassionate support.

A. The Act Is Not Content- or Viewpoint-Neutral

As the Court explained in *Hill*, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." 530 U.S. at 731 (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S.

106, 112 (1949) (Jackson, J., concurring)). Here, Massachusetts has instead taken care to frame an Act that as a practical matter affects speech on only one issue—and, indeed, on only one side of that issue. The Act's lack of generality or neutrality is demonstrated both by the specific locations at which it applies and by the specific speakers whom it affects.

1. The Act applies only where abortions are performed

The Act's restrictions apply only to free-standing facilities where abortions are performed—and only during business hours. Mass. Gen. Laws ch. 266, § 120E½ (a)-(c). By design, virtually all speech affected by the Act is speech concerning abortion.

The courts below reasoned that *Hill* had blessed this approach. "'Just as targeting medical centers did not render Colorado's counterpart statute content based, so ... too the Act's targeting of [abortion clinics] fails to undermine its status as a content neutral regulation.'" Pet. App. 166a-167a (quoting *McGuire I*, 260 F.3d at 44) (second alteration added). That misreads *Hill*.

Hill emphasized that Colorado's statute was content-neutral because the State asserted an interest in protecting patients from confrontational speech; patients at all healthcare facilities shared that interest; and the State's restriction on close, unconsented approaches applied equally at all such facilities. Thus, the law did not "distinguish among speech instances that [were] similarly likely to raise the legitimate concerns to which it respond[ed]." 530 U.S. at 724. In assessing content-neutrality, "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence

against there being a discriminatory governmental motive." *Id.* at 731. Indeed, it was "*precisely because* the Colorado Legislature made a *general policy choice* that the statute [was] assessed under the constitutional standard" for time, place, and manner restrictions, rather than a stricter standard. *Id.* (emphasis added).

Here, in contrast, Massachusetts has cordoned off the single activity of abortion, putting otherwise public sidewalks off limits to individuals (other than clinic agents) who want to enter the area to speak. The interests the State advances—freedom from violence and obstruction—apply outside every building in the State that hosts any activity that might occasion protest or comment. The special restrictions imposed by the State outside abortion clinics do not. Indeed, in its statute protecting access to health care facilities generally, Massachusetts prohibits only actual obstruction—carefully preserving the "right[] to engage in peaceful picketing which does not obstruct entry or departure." Mass. Gen. Laws ch. 266, § 120E.

The "inevitable effect" of the 2007 Act's targeted approach is that virtually all of the speech burdened by the Act will be speech about abortion. *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968); *see also Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2663-2664 (2011) (law is content-based when its "'practical operation'" is to "impose[] burdens that are based on the content of speech" (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992))); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). It is thus no surprise that after more than six years of litigation, there is no record of any speech about other topics at the locations affected by the Act.

This sort of targeted burdening of speech outside abortion clinics is no more permissible than a law prohibiting picketing at schools except if they are "involved in a labor dispute." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 93, 101-102 (1972); *see also Carey* v. *Brown*, 447 U.S. 455, 457, 461-463 (1980). Just as the government may not may create rules favoring speech on "one preferred subject," *Mosley*, 408 U.S. at 101, it may not create rules that effectively disfavor speech on one topic. The same problem would exist if a legislature effectively regulated environmental, animal-rights, or labor protests by establishing special speech-restrictive zones outside only power plants, or slaughterhouses, or unionized factories. Such laws ignore Justice Jackson's admonition that regulations "impose[d] upon a minority must be imposed generally." *Railway Express*, 336 U.S. at 112; *see also Hill*, 530 U.S. at 731.[5]

Similarly, the Act is not a neutral regulation with an "incidental effect on some speakers or messages but

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[5] The Court's opinion in *Hill* observes that "[a] statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would ... not be 'content based' even if it were enacted by a racist legislature that hated civil rights protestors[.]" 530 U.S. at 724. That might be true if the statute advanced a legitimate state interest (*but see id.*) and addressed that interest in a way that could plausibly be described as involving a "general policy choice." *Id.* at 731. It would not be true if the statute applied, for example, only at a subset of lunch counters that refused to serve African-American customers. Likewise, a law purporting to protect passenger access by restricting speech at all airports might not be content-based simply because it was subjectively "motivated" by experience with a particular type of speech. *Id.* at 724. But a similar law applying only to airports where (and when) troops were embarking or returning, or to airports involved in labor disputes, would surely be recognized as content-based.

not others." *Ward*, 491 U.S. at 791. On the contrary, both the State and the lower courts have consistently acknowledged that the Act's focused effect on speech about abortion is deliberate. Massachusetts did not set out to keep down noise levels generally, *see id.* at 792, or to maintain all public spaces in an attractive condition, *see Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). It acted, as the court of appeals concluded, to "combat[] the deleterious secondary effects *of anti-abortion protests*." Pet. App. 166a (emphasis added) (quoting *McGuire I*, 260 F.3d at 44); *see also id.* 113a. Indeed, in *McCullen I* the First Circuit rejected a vagueness challenge to the Act because petitioners "must know" that "anti-abortion protest[] ... falls squarely within the hard core of the proscriptions." *Id.* 117a.

For these reasons, the Act is not like the no-approach law sustained in *Hill*. That law may have been motivated by specific concerns about abortion-related speech, but it was drawn and defended in general terms as a means of protecting a broad class of potentially vulnerable listeners outside all healthcare facilities. *See* 530 U.S. at 709-710, 723-725.[6] It was also drawn to restrict only unconsented approaches—not speech with willing listeners, and not speech proffered by a stationary speaker. In his concurring opinion, Justice Souter reasoned that "[t]he fact that speech by a stationary speaker [was] untouched by th[e] statute show[ed] that the reason for its restriction on ap-

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[6] Similarly, *Frisby* v. *Schultz*, 487 U.S. 474 (1988), held content-neutral a statutory prohibition on residential picketing that was motivated by abortion protests, *id.* at 476, but was generally drawn to prohibit picketing at all residences, *id.* at 476-477, 481-482, not merely residences of abortion-providers.

proaches [went] to the approaches, not to the content of the speech of those approaching." *Id.* at 738. In contrast, the Act prohibits speakers (other than clinic agents) from entering its restricted zones at all. Their speech is categorically restricted, whether or not it raises any prospect of the violence and obstruction that the Act was ostensibly designed to prevent.[7]

A law that, like the 2007 Act, is so selective in the locations to which it applies that it deliberately and disproportionately burdens speech about one particular topic cannot properly be viewed as "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791.

2. The Act exempts abortion-clinic speakers

Indeed, the 2007 Act is not only content-based, but viewpoint-based. On its face, the Act exempts all "employees or agents of [an abortion clinic] acting within the scope of their employment." Mass. Gen. Laws ch. 266, § 120E½(b)(2). This Court has recognized that such an exemption from a speech regulation "may rep-

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[7] Ironically, the Act's targeting of content is confirmed by the fact that it applies at all abortion clinics, even those such as Worcester and Springfield, about which the legislature heard no evidence of any problems. Rather than proceed by injunction against specific wrongdoers at specific locations, the State apparently assumed that abortion clinics will always prompt anti-abortion speech that will be problematic. But that assumption is inconsistent with the First Amendment. *See Mosley*, 409 U.S. at 100-101 ("Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.").

resent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional[.]"); *R.A.V.*, 505 U.S. at 392 (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). Here, the exemption for clinic speakers is inescapably viewpoint-based. Any speech by clinic agents "within the scope of their employment" will necessarily express the clinic's view.

Moreover, the evidence below confirmed that clinic speakers do, in fact, use their privileged access to the public sidewalks both to speak the clinics' message and to obstruct or counter petitioners' speech. Clinic agents express the clinics' views by saying things like "abortion is legal," "it's important for women to have a choice," "we have help," or "we'll help you get inside." JA 165. And they seek to drown out petitioners' alternative message by surrounding incoming women; raising and lowering their arms to prevent petitioners from placing literature near the hands of potential recipients; and yelling, making noise, chattering, or talking loudly, saying things such as "you don't have to listen to [him, her, them]," "don't pay any attention to [him, her, them]," "don't listen to [him, her, them]," or "[She, He, They] is/are crazy." JA 165, 169, 178, 189-190. All this the Act leaves them free to do within the zones from which petitioners are excluded.

The lower courts believed such speaker distinctions in the public forum were permissible so long as a court could "envision" at least one "legitimate reason" for the preferences. *McGuire I*, 260 F.3d at 47; *accord* Pet. App. 105a-106a. They held that this standard—stated in the language of rational-basis review—could be satisfied by a legislative preference for activities that would "'facilitate safe access'" to abortion clinics, or a desire to make "'crystal clear'" that speakers with that objective "'need not fear prosecution,'" Pet. App. 172a-173a (quoting *McGuire I*, 260 F.3d at 46)—in contrast to petitioners, who of course were meant to fear prosecution and therefore to keep their speech outside the forbidden zone. Citing *Hill*, the lower courts also thought that clinic agents could be exempted because the State "'could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners.'" *Id.* 172a (quoting *McGuire I*, 260 F.3d at 46).

The First Amendment cannot tolerate any such approach. It is axiomatic that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor may the government "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96. Indeed, *Hill* made precisely this point in holding that the statute at issue there was content-neutral:

> The close approach of the latter, more hostile, demonstrator may be more likely to risk being perceived as a form of physical harassment; but *the relevant First Amendment point* is that the statute would prevent *both* speakers, unless

> welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion.... It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion and whether they oppose or support ... an abortion decision. *That is the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added).

In upholding a statute that does not apply equally to clinic and non-clinic speakers, the lower courts completely ignored this passage from *Hill*. It is neither neutral nor permissible for the State to prefer clinic agents' use of public sidewalks over petitioners' wish to enter the same area to extend peaceful offers of alternative help. *See also, e.g., Mosley*, 408 U.S. at 96.

The Ninth Circuit properly rejected government favoritism in precisely the same context in *Hoye* v. *City of Oakland*, 653 F.3d 835, 851-852 (9th Cir. 2011). In enforcing a *Hill*-style "no approach" law, the Oakland police as a matter of policy preferred speakers who "facilitate[d] access to clinics" to those who peacefully offered access to alternatives. As Judge Berzon explained, however, "distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction." *Id.* at 851. An enforcement policy "permit[ting] speech on one side of a controversial public debate, but not on the other" was "indubitably content-based":

> Asking a woman "May I help you into the clinic?" facilitates access; "May I talk to you about alternatives to abortion?" discourages it. Telling a woman, "It's your right to have an abor-

> tion!" facilitates access; telling her, "If you have an abortion, you will regret it!" discourages it.

Id. at 852. Looking to *Hill*, the court had no trouble concluding that favoring speakers who facilitated access "does not meet th[e required] level of neutrality." *Id.* (quoting *Hill*, 530 U.S. at 725). The same is true here.

The record in this case confirms that such discrimination has real consequences for women considering whether to have abortions. Before adoption of the 2007 Act, hundreds of women accepted the information and assistance offered by petitioners, and many ultimately chose an alternative to abortion. *See, e.g.*, JA 136 (McCullen: "Over the years, hundreds of women have accepted my offers of help."). After 2007, those numbers precipitously declined. *See, e.g.*, JA 180 (Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the Act took effect[.]").

Undisputed evidence shows that women often have abortions because of financial or other pressures, including pressure from husbands or boyfriends. *See, e.g.*, JA 132-133 (McCullen: "Most women that I speak with tell me they do not want an abortion but feel they have no viable alternative."); JA 101 (respondents' witness acknowledging that "economic hardship" "might be a problem" and that women "to some extent" may feel pressured by husbands or boyfriends who want them to abort). Academic studies confirm that women often seek abortions because they feel they cannot afford a baby, are having relationship problems, or are

being pressured. *See, e.g.*, Finer et al. (discussed *supra* p. 11).

Massachusetts has made it harder for petitioners to reach such women with their peaceful offers of help, and thus deprived these women "of the right and privilege to determine for [themselves] what speech and speakers are worthy of consideration." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340-341 (2010). The First Amendment "protects the public's interest in receiving information" precisely so that the government cannot do what it has done here: "limit[] the range of information and ideas to which the public is exposed." *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Calif.*, 475 U.S. 1, 8 (1986).

3. The Attorney General's "guidance"

In January 2008, the Attorney General sent a letter to local law enforcement and clinic personnel providing "guidance" with respect to the exemptions in the 2007 Act. JA 90-94; *see* Pet. App. 98a, 119a-120a, 155a-157a. The letter asserts that the exemption for clinic employees and agents "does not allow them to express their views about abortion or to engage in any other partisan speech" within the Act's exclusion zone. JA 93. It likewise seeks to limit the exemption for passers-by, instructing that they may not "do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech)." JA 93-94.

The Attorney General's "guidance" should be taken for what it is—a deliberate but unsuccessful attempt to "rewrite a law to conform it to constitutional requirements." *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and ellipsis omitted).

The proffered construction lacks any basis in the statutory text. A statutory provision expressly permitting clinic agents to use public sidewalks "within the scope of their employment," or permitting citizens to use a stretch of sidewalk on their way somewhere else, cannot be read to forbid those uses if they involved abortion-related or "partisan" speech.

Moreover, in seeking to avoid one constitutional infirmity, the Attorney General only highlights others. Her guidance seeks to make the Act seem even-handed, by prohibiting the expression of "views about abortion" by persons otherwise exempted from the Act. That effort, however, simply confirms that regulation of such abortion-related speech is the very purpose of the Act. Similarly, in seeking to make the Act seem neutral, the guidance would make it both impermissibly vague and expressly content-based. While speakers offering alternatives to abortion would still have to stay outside the Act's painted exclusion zones, clinic agents and passers-by could enter the zones so long as they then restricted their speech to stay away from "views about abortion" or whatever the police or the Attorney General might deem "other partisan speech."[8]

In any event, the Attorney General's "guidance" has no legal significance. Enforcement authorities, like courts, may sometimes adopt *narrowing* constructions to avoid questions about the constitutionality of a facially broad statute. *See, e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 482-483 (1988). Here, however, the Attorney

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[8] Explaining the purported limitations on passer-by speech to the First Circuit, respondents suggested that wearing a Cleveland Indians shirt in Red Sox territory or singing "We Shall Overcome" could result in arrest. Oral Arg. Tr., 2009 WL 1346643 at *10-12; *see also* Pet. App. 114a-115a.

General purports to *broaden* the scope of a criminal statute. That is something neither a prosecutor nor a court may do. If Massachusetts sought to prosecute a clinic agent for speaking on behalf of the clinic—or two citizens who walked by the clinic while arguing heatedly about abortion or the death penalty—the charge would have to be dismissed as a matter of law by reason of the unambiguous statutory exemption. The Attorney General's attempt to rewrite the statutory exemptions actually adopted by the state legislature is "pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Stevens*, 559 U.S. at 480.

B. The Act Is Not Narrowly Tailored

The second requirement for a permissible time, place, and manner regulation is that it be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791. Massachusetts cannot show such tailoring here. Its legitimate interests are already amply served by prohibitions on abusive conduct. In fact, subsection (e) of the Act—which is not challenged here—expressly prohibits the conduct the Act purports to remedy. Pet. App. 220a-221a ("Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished" by fine or imprisonment.). By establishing a further broad, prophylactic zone from which petitioners and similar speakers are wholly excluded, the 2007 Act burdens substantially more speech than can be justified.

1. Existing laws, if used, would amply protect the State's interests in public safety and clinic access

Massachusetts has articulated two primary interests it seeks to advance through the 2007 Act: protecting public safety "very close to" and in the areas "immediately outside [of]" clinic entrances and ensuring safe, unhindered access to the clinics. *McCullen I* CA-JA 294-296; *see also* Pet. App. 107a, 177a-178a; *McGuire I*, 260 F.3d at 48 & n.3. The original 2000 Act was ostensibly adopted in light of "repeated incidents involving violence and other unduly aggressive behaviors in the vicinity of reproductive health care facilities" in the 1990s, and the 2007 amendments (creating the current exclusion zones) assertedly resulted from "unanticipated difficulties in enforcing the 2000 Act [that] called into question that Act's efficacy." Pet. App. 95a, 97a.

Petitioners have never disputed the general legitimacy of state interests in protecting public safety and preventing obstruction, intimidation, or harassment. *See, e.g.*, Pet. App. 178a. But to justify regulations that burden public-forum speech, the State must show that it is addressing a real problem in a narrowly-tailored way. In particular, this Court has invalidated speech restrictions where, among other considerations, less problematic measures were adequate to protect government interests. *See, e.g.*, *Riley* v. *National Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it."); *Kunz* v. *People of New York*, 340 U.S. 290, 294 (1951) ("There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence.").

Here, the interests in public safety and access are already amply served by numerous state and federal criminal prohibitions, including subsection (e) of the Act, that precisely target inappropriate conduct: harassment, blockading, hindering, impeding, assault, intimidation, disturbing the peace, or the like.[9] Similarly, both federal and state law allow government agencies, medical facilities, and individuals to seek injunctive and other civil relief against persistent offenders.[10] On a proper evidentiary record, a targeted injunction may ban a repeat lawbreaker from a zone around a clinic. *Madsen*, 512 U.S. at 768-769 (upholding exclusionary injunction where those restrained "repeatedly had interfered with the free access of patients and staff").

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[9] *See, e.g.*, Mass. Gen. Laws ch. 266, § 120E½(e) (obstructing, detaining, hindering, impeding, or blocking a person's entry to abortion clinic); *id.* § 120E (obstructing entry to medical facilities); 18 U.S.C. § 248(a)(1) (using force, threat of force, or physical obstruction to injure, intimidate, or interfere with any person obtaining or providing reproductive health services); Mass. Gen. Laws ch. 265, § 13A (assault and battery; enhanced sentence if perpetrator knows victim is pregnant); *id.* ch. 272, § 53(b) (disturbing the peace). State and federal laws also specifically prohibit impersonating a police officer—a form of misconduct advanced as a justification for the 2007 Act. *See id.* ch. 268, § 3; 18 U.S.C. § 912; JA 124.

[10] *See* 18 U.S.C. § 248(c)(1) (permitting any person seeking to provide or obtain reproductive health services to seek injunctive relief, attorneys' fees, and compensatory and punitive damages); *id.* § 248(c)(2)-(3) (permitting federal and state attorneys general to seek injunctive relief, civil penalties, and compensatory damages on behalf of aggrieved persons); Mass. Gen. Laws ch. 266, § 120E (permitting medical facilities to obtain injunctive relief and compensatory and exemplary damages against persons obstructing entry); *id.* ch. 12, § 11H (permitting state attorney general to obtain injunctive relief against private persons who intimidate, interfere with, or coerce a person seeking to exercise rights protected by federal or state law).

Massachusetts enacted its 2007 Act despite the lack of any legislative record showing that either the State or private parties had even tried to use these laws to address any improper conduct outside abortion clinics. There is no reason to think that this failure to use available tools reflects any special problem with the enforceability of clear prohibitions on assault, obstruction, and the like. People outside a clinic either block doors and driveways, for example, or they do not. (Petitioners do not.) If such behavior actually occurs, the appropriate response is to proceed against specific wrongdoers—not to ban non-obstructive and peaceful speakers from entering broad swaths of public sidewalk to speak.

At hearings on the 2007 Act, some witnesses did suggest that the State's 2000 no-approach law, partly modeled on the law upheld in *Hill*, was difficult to enforce. *See, e.g.*, JA 79 (testimony of Attorney General Coakley). That is ironic, given that *Hill* sustained Colorado's law in part on the theory that the no-approach standard provided a "bright-line prophylactic rule," "offer[ed] clear guidance," and "avoid[ed] subjectivity." 530 U.S. at 729. It is also inconsistent with the Attorney General's testimony, at the same hearing, that a video she displayed for legislators showed "clear" violations of the original Act. *See* JA 78 ("Here are workers for the clinic who clearly are approached, are touched. That's clearly against the law, by people who ... do not ... have the right to harass and intimidate under the Constitution.").[11] If the State had clear, recorded evi-

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[11] Law enforcement testimony in the *McGuire* case—when respondents were defending the 2000 Act—likewise indicated that it was "easy" to analyze consent to approach under that Act, but that enforcement authorities "tr[ied] not to arrest anyone" even though they "d[id] see violations." JA 29-30.

dence of unlawful assault, harassment, intimidation, or unwanted "approaches," it was free to bring its allegations before the courts.

In any event, possible difficulties in enforcing an unnecessary and constitutionally suspect law would be a reason to repeal it—not to replace it with an even less justifiable Act that flatly prohibits petitioners and other from entering parts of the public sidewalks to engage in peaceful, non-obstructive speech. And certainly the Act at issue here cannot be justified as "narrowly tailored" to protect safety or prevent obstruction when the State has evidently chosen not to avail itself of many other available tools that are both constitutionally unobjectionable and designed quite precisely to serve its stated ends.

2. Excluding all speakers from public sidewalks near clinic entrances is not a narrowly tailored way to protect state interests

Even if the State could establish a need to burden some speech in order to protect its interests, excluding most speakers from large, otherwise public zones outside clinic entrances is not a "narrowly tailored" approach to Massachusetts' articulated interests. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (citing *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)). The State must not "burden substantially more speech than is necessary to further [its] legitimate interests." *Ward*, 491 U.S. at 799. A "complete ban" on a particular place or method of communication "can be narrowly tailored, but only if each activi-

ty within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485-486.

Previous abortion-related "buffer zones" this Court has considered have been tailored either to apply only to proven wrongdoers, *Madsen*, 512 U.S. at 768-769; *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997), or to close, physical approaches to unwilling listeners, *Hill*, 530 U.S. at 715-718. Similarly, in other cases, the Court has taken care to require that governments avoid broad, supposedly "prophylactic" rules, and instead target only activities that actually threaten their asserted interests. *See, e.g.*, *Riley*, 487 U.S. at 801 ("'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'"); *Grayned* v. *City of Rockford*, 408 U.S. 104, 119-120 (1972) (law upheld because government did not use an "impermissibly broad prophylactic ordinance" but instead required determinations about disruption "on an individualized basis").

Here, Massachusetts in 2007 replaced a law that at least started from the unconsented-approaches model upheld in *Hill* with a broad exclusion zone that is avowedly prophylactic in nature—justified primarily by asserted difficulties in enforcement of rules against specific conduct, and responding to police testimony that having an area "where no protesters can go" would "make [enforcement] so much easier." JA 68. But "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. Three examples should suffice to confirm that that is exactly what Massachusetts has done.

a. *Consensual conversations*

The 2007 Act makes large swaths of public sidewalk off-limits to anyone (other than a clinic employee or agent) who wants to enter the area near clinic entrances to speak about abortion (or anything else). The prohibition covers not only loud, raucous, or confrontational speech, but also petitioners' quiet, consensual conversations. Barring use of a quintessential public forum for the peaceful exchange of ideas or information among willing citizens strikes at the very heart of the First Amendment. *See, e.g.*, *Kokinda*, 497 U.S. at 743 (public access to sidewalks "is not a matter of grace by government officials but rather is inherent in the open nature of the locations."); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("a principal purpose of traditional public fora is the free exchange of ideas"); *Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939) (streets and sidewalks "are natural and proper places for the dissemination of ideas and opinion"). And a regulation that bars even consensual speech is not narrowly tailored to serve interests in public safety or orderly access.

In *Hill*, Colorado prohibited speakers from "approaching" within eight feet of a potential listener *without obtaining consent*. In sustaining the law, this Court noted the "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." 530 U.S. at 715-716. It emphasized that Colorado had sought to regulate "only the latter." *See, e.g.*, *id.* at 718 (restrictions "only apply to communications that interfere with" a "'right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined"); *id.* at 723 (characterizing law as establishing "a minor place re-

striction on ... communications with unwilling listeners"); *id.* at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected."); *see also, e.g.*, *Frisby*, 487 U.S. at 484-485.

Massachusetts, in contrast, has banned petitioners and others from entering parts of its public sidewalks even to proffer literature or continue consensual conversations with willing listeners. They may not enter or stand within the forbidden zone to make a peaceful "offer to communicate" which the listener could accept or decline. *Hill*, 530 U.S. at 718. And even if they are already engaged in a consensual conversation with a listener who is headed toward the zone, they must stop in their tracks when the listener steps over the State's painted line—thus interrupting the discussion and communicating to the listener that the *government* deems petitioners and their message untrustworthy, unsafe, or bothersome, rather than letting her listen to the message and make her own decisions about whether she wants to continue conversing. These restrictions cannot be defended as necessary to protect public safety or clinic access.

b. ***Leafleting***

The 2007 Act also bans leafletting within its zones. This, too, burdens core protected speech. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression," and "no form of speech is entitled to greater constitutional protection." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Here too Massachusetts has gone far beyond what this Court allowed in *Hill*. There, speakers could enter and remain in the zones so long as they did not affirma-

tively approach within eight feet of a potential listener without first obtaining consent. The Court recognized that this raised a serious issue, because "an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients." 530 U.S. at 727. "[T]he First Amendment," the Court observed, "protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Id.* at 728 (internal quotation marks omitted). Ultimately, however, the Court accepted Colorado's law as adequately tailored to safeguard those rights because it did not "prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians [could] easily accept." *Id.* at 727.

Massachusetts, in contrast, flatly forbids speakers from entering the zones extending 35 feet in all directions from clinic entrances. The prohibition applies even if the leafletter remains in one place, and without regard to any consideration of violence, obstruction, physical approach, or listener consent.[12] Depending on where they are standing when a particular potential listener approaches the zone, petitioners' only "opportunity to win their attention" may be to shout or wave from a distance of 70 feet or more.

The court of appeals dismissed this concern with the observation that "handbilling is not specially protected." Pet. App. 110a. That cavalier approach to the required narrow tailoring analysis cannot be reconciled with *Hill*. As *Hill* clearly recognizes, the core First Amendment right to speak peacefully in the public fo-

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[12] Massachusetts likewise bars speakers from entering the zone to stand and display a sign. *Compare Hill*, 530 U.S. at 726.

rum "extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943); *see Hill*, 530 U.S. at 715, 727-728. If government regulation burdens that right—even only as to time, place, or manner—it must be narrowly tailored to serve significant interests. Here, Massachusetts' interests in public safety and clinic access cannot justify the heavy burden it has placed on petitioners' ability to engage in peaceful leafletting in otherwise public space.

c. *Conversational distance*

Finally, *Hill*'s narrow-tailoring analysis makes clear that it matters how far a regulation keeps a speaker from her potential audience. Contrasting Colorado's unconsented-approach law with an injunctive provision struck down in *Schenck*, the *Hill* Court reasoned that "[u]nlike the 15-foot zone in *Schenck*, [Colorado's] 8-foot zone allow[ed] the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-727. As the United States explained in its brief in *Hill*, the eight-foot distance from which a speaker was required to seek consent before approaching further could be viewed as narrowly tailored to serve interests in "preventing assaults, intimidation, and obstruction without unduly burdening speech." 98-1856 U.S. Br. 13. Eight feet, the United States argued, was "close enough to deliver a message, but not close enough to obstruct access or to deliver a blow." *Id.* at 12.

Here, in contrast, Massachusetts has established zones that often keep petitioners or other speakers 35 feet or more from individuals with whom they would offer to speak. The court of appeals, again, rejected (as "jejune") petitioners' argument that this difference was even relevant to narrow-tailoring. Pet. App. 110a. But

the degree of separation that the State seeks to impose between speakers and potential listeners makes an obvious difference when the question is whether state-imposed burdens on speech are adequately justified by asserted state interests. Where the governmental interests are public safety and preventing obstruction or harassment, an eight-foot unconsented-approach zone may be adequately tailored to the goal. A 35-foot fixed exclusion zone is not.

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These examples of speech prohibited or burdened by the Act without justification in terms of the State's asserted interests are sufficient to show a lack of narrow tailoring. But they do not stand alone. The Act forecloses *all* speech activities on public sidewalks by non-exempt speakers within the zones. Almost by definition, such a categorical speech-exclusion zone Act does not "respon[d] precisely to [any] substantive problem which legitimately concern[ed]" the State, *Vincent*, 466 U.S. at 810, because it does not even purport to differentiate between problematic and unproblematic activities. The law thus lacks the "'[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Riley*, 487 U.S. at 801.

3. The Act is impermissibly overbroad

For the same reasons that it is not narrowly tailored, the 2007 Act is also impermissibly overbroad. "'[A] substantial number of its applications are unconstitutional, judged in relation to [any] plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473.

Except for specially exempted speakers, the Act "purports to create a virtual 'First Amendment Free Zone'" on public sidewalks near abortion clinics. *Board*

of Airport Comm'rs of L.A. v. *Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). Like the law banning speech in airports at issue in *Jews for Jesus*, the Act "does not merely regulate expressive activity ... that might create problems such as congestion or ... disruption" but outlaws all communicative activity on otherwise open sidewalks—even "talking and reading, or the wearing of campaign buttons or symbolic clothing." *Id.* at 574-575.[13] These activities "are presumptively protected by the First Amendment but ... remain subject to the criminal sanctions of" the Act. *Stevens*, 559 U.S. at 481.

Jews for Jesus held that "no conceivable governmental interest would justify such an absolute prohibition of speech" *even in a non-public forum*. 482 U.S. at 575. *A fortiori*, Massachusetts may not create such speech-free zones on public sidewalks. The State may, of course, "prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). But it is constitutionally required to pursue such goals "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Id.* Here, whatever legitimate sweep the 2007 Act may have is surely dwarfed by the number of its applications that have no constitutional justification. The Act is thus impermissibly overbroad. *Stevens*, 559 U.S. at 473.

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[13] *Compare* Pet. App. 205a-206a (district court reasoning that Act, at least as construed by the Attorney General, "clearly" prohibits even wearing "shirts with abortion-related messages" while passing through marked zones).

C. The Act Does Not Leave Open Ample Alternative Channels Of Communication

The final part of the time, place, and manner standard requires the government to prove that its regulation of speech leaves open "ample" alternative channels of communication. *E.g.*, *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977). This Court has struck down statutes for not preserving ample alternative channels where the statute relegates the speaker to options that "are less likely to reach persons not deliberately seeking [the] information" or are "less effective media for communicating the message that is conveyed." *Id.*; *see also Ladue*, 512 U.S. at 57 (striking down statute that left "no practical substitute" for prohibited activity and where intended audience "could not be reached nearly as well by other means").[14]

The court below upheld the Act on the theory that petitioners could communicate by standing outside the State's painted lines and shouting, using bullhorns, waving large signs, or dressing in costumes.[15] Pet. App. 111a. As this Court unanimously explained, however, "direct one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue

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[14] *Linmark*, for example, struck down an ordinance prohibiting the posting of "For Sale" and "Sold" signs on property because it unduly burdened speakers' ability to reach their intended audience. 431 U.S. at 93.

[15] Despite the lower court's unsupported suggestion to the contrary, Pet. App. 23a, petitioners do not dress up in costumes and there is no evidence that suggests otherwise. Petitioners believe such behavior would be an ineffective way to communicate their supportive message of help, and indeed, some testified that such tactics are counter-productive. JA 215, 246.

of political discourse." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988).[16] The alternatives to which the State and the court of appeals would relegate petitioners are far less effective and far less likely to reach persons who would not deliberately seek out the information petitioners offer. They are not remotely adequate substitutes for ordinary access to public sidewalks for the purpose of offering to engage fellow citizens in peaceful conversations as civilized and caring adults.

1. The Act fails to leave open the alternative channels this Court relied on in *Hill*

Massachusetts cannot deny petitioners the right to speak on public sidewalks simply because they may still speak elsewhere. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163. This Court, therefore, generally considers what alternative means of communication remain *inside* speech-restricting zones, not just outside them.[17]

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[16] Even in the realm of commercial speech, the Court has recognized the constitutional significance of being able to engage in one-on-one communication. *See Edenfield* v. *Fane*, 507 U.S. 761, 766 (1993) ("Unlike many other forms of commercial expression ... [personal solicitation] allows direct and spontaneous communication between buyer and seller" and permits buyers "to meet and evaluate the person offering the product or service[.]").

[17] *See, e.g., Vincent*, 466 U.S. at 812 (prohibition on "posting of signs on public property" left open adequate alternatives where it preserved "freedom to exercise the right to speak and to distribute literature *in the same place*" (emphasis added)); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 & n.16 (1981) (regulation limiting distribution of literature to fixed booths sustained where petitioners could still "mingle with the crowd and orally propagate their views," and were not subject

In *Hill*, for example, this Court emphasized that Colorado's restrictions on unconsented approaches left speakers in exactly the same areas outside healthcare facilities with many remaining options. They remained free to engage in any speech with willing listeners; to distribute leaflets from a distance of no more than eight feet; to stand holding a sign; and to proffer speech to potential (and even unwilling) listeners from a "normal conversational distance" of, again, no more than eight feet. 530 U.S. at 726-730.

In 2007, Massachusetts stripped petitioners of all these alternatives. Petitioners may not enter the zones to engage in *any* speech. Gone is the freedom to speak face to face with a willing listener. Gone is the ability to speak from a normal conversational distance. Gone is the ability to offer leaflets. Gone is the ability of a potential listener to respond to a non-threatening proffer of information or support by inviting petitioners to approach and talk. Gone is the ability to stand peacefully and hold a sign, or even simply stand in silent prayer. Each of these activities, permitted under *Hill*, is foreclosed here. For that reason, the Act does not leave open ample or even adequate alternative means for petitioners to proffer their speech. It cannot be sustained under *Hill*.

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to "a total ban on protected First Amendment activities in the ... fairgrounds"); *Frisby*, 487 U.S. at 483-484 (targeted residential picketing regulation upheld where availability of ample alternatives was "virtually self-evident" because protesters retained ability to "march[] through residential neighborhoods ... in groups," "walk[] a route in front of an entire block of houses," and "go door-to-door to proselytize their views" and "distribute literature").

2. The record in this case confirms the inadequacy of alternative channels for petitioners' speech

The specific factual evidence presented in this case further demonstrates the inadequacy of the remaining channels of communication. The Act has left petitioners with alternatives that are demonstrably and without dispute "less effective media for communicating" their message. *Linmark*, 431 U.S. at 93.

As described at pp. 9-16 above, petitioners' evidence both memorializes and supports their view that women often have abortions because of financial or other pressures that make them feel they have no real alternative. Petitioners testified without contradiction that in order to be effective their messages must be conveyed through personal communication, from a conversational distance, with a calm voice, caring demeanor, and eye contact. In particular, shouting from a distance is ineffective and counter-productive. Petitioners testified, from long personal experience, that even women who would welcome a message about alternatives to abortion will typically not make the effort to accept proffered literature unless it can be offered near their hands in a peaceful, non-threatening manner.

The State offered nothing to rebut this evidence. It did not contest petitioners' showing that, under the 2007 Act, even when they can begin conversations, those conversations are shorter, louder and have different content than when petitioners were permitted to speak without the restrictions imposed by the Act's exclusion zones. To the contrary, the State's own witnesses confirmed that the only effective communication they witnessed on streets and sidewalks around abor-

tion clinics was the sort of personal conversation that the Act severely restricts. *See supra* p. 12.

Further, respondents failed to rebut testimony regarding the particular burdens created by the Act at the Worcester and Springfield clinics. There, the Act virtually eliminates petitioners' previous ability to make contact with potential listeners, because it creates an exclusion zone around the driveways used by the vast majority of persons visiting the clinics. *See* JA 200, 217, 249. Petitioners Bashour and Clark testified without contradiction about how far away they are forced to stand from any incoming car in Worcester, and how they are now effectively unable to distribute any literature to incoming cars. JA 244, 252. Likewise, petitioner Shea testified without contradiction about his inability to distribute literature or begin conversations while avoiding the exclusion lines painted around the Springfield clinic driveways. JA 200.[18]

The evidence also confirmed that these restrictions have had a real impact on the number and quality of petitioners' conversations. For example, petitioner Zarrella testified that although she had approximately 100

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[18] The court of appeals viewed the use of private driveways as the "main impediment to communicative activity" at the Worcester and Springfield sites. Pet. App. 24a. The court erred in disregarding petitioners' evidence that it was the Act's imposition of an exclusion zone *around the driveways* that cut off what had been—because of the pre-existing conditions noted by the court—their only meaningful opportunity to interact with most clinic patients. *Compare Hill*, 530 U.S. at 730 ("Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied."); *Hoye*, 653 F.3d at 858-859 ("the factual predicate of an as-applied challenge does not need to be created by the State").

successful interactions with women approaching clinics before the 2007 Act, the Act so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction since it took effect. JA 180. McCullen testified that the Act has prevented her from speaking with at least 5-6 people per day of her outreach activity, or 480-586 people per year. JA 136-137. Clark testified that she rarely gets more than a fleeting look from women entering the front door of the Worcester clinic to the spot across the street where she is now forced to stand. JA 217.

The district court responded to this evidence by suggesting that people were "simply unreceptive" to petitioners' message. Pet. App. 49a-50a. But that response defies common sense. Petitioners' message has not changed; the rules governing their speech have.

To the contrary, the evidence fully supports petitioners' contention that calm, peaceful, personal communication is crucially and constitutionally significant in this case because it "carries a message quite distinct from," and provides "information about the identity of the speaker" quite unlike, the speech the Act allows—signs, shouting, or hurried half-conversations carried on while making sure not to step over the State's exclusion line. *See Ladue*, 512 U.S. at 56 (invalidating restriction on residential lawn signs because of particular messages and information they conveyed, even though speakers remained fee to employ "hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings'" (emphasis omitted)).[19] "The First Amendment protects [citizens']

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[19] The court below declined to apply *Ladue* because this Court's later abortion-clinic speech cases—*Hill*, *Madsen*, and

right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. Massachusetts cannot bear its burden of proving that the Act leaves petitioners with ample alternative channels for their speech.

D. The Act Cannot Survive Strict Scrutiny

Because the Act substantially burdens public-forum speech and cannot be sustained as a permissible time, place, and manner regulation, it must be invalidated unless Massachusetts can show that it is nonetheless the least restrictive means available to achieve a compelling governmental interest. *See, e.g.*, *Playboy*, 529 U.S. at 813. The State must prove the existence of an "actual problem" in need of solving, and then demonstrate that its curtailment of free speech is "actually necessary" to the solution. *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks omitted). This strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

For the same reasons that Massachusetts cannot establish that its Act is narrowly tailored to serve significant state interests, it certainly cannot show that the law is the least restrictive means of pursuing a compelling interest. As discussed above (*see supra* Part I.A), the State's interests in protecting safety and ensuring unobstructed access, even if "compelling" in this context, could be amply protected by the enforcement of any number of existing, constitutionally unproblematic prohibitions on improper conduct. The

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Schenck—did not rely on it. The court characterized as "much different" the "problem of how the First Amendment operates when the special concerns of public-sidewalk protests around abortion clinics are at stake." Pet. App. 26a; *see also id.* 11a–14a.

State thus cannot show either that it has an actual problem or that speech restrictions are necessary to solve it. And even if it could make that showing, it could not further show that the broad, indiscriminate exclusion zones it has created are remotely necessary to address whatever problem may exist, let alone the least restrictive means to that end. *See supra* Parts I.B and I.C. Accordingly, for the same reasons that it is not a permissible time, place, or manner regulation, the Act cannot survive strict scrutiny review.

II. This Court Should Revisit *Hill*

For the reasons set forth above, the Act cannot be sustained under *Hill*, because it abandons both *Hill*'s insistence on true neutrality and its narrow focus on close physical approaches to unwilling listeners. In deciding this case this Court should, at a minimum, emphasize that these limiting principles are real, and that *Hill* marks an outer limit of government power to criminalize peaceful, non-obstructive speech on public sidewalks. Alternatively—and certainly if any plausible reading of *Hill* might suggest, as the court below concluded, that the Act at issue here could be sustained—the Court may wish to consider whether *Hill* should be substantially clarified, narrowed, or overruled.

Stare decisis is not an inexorable command. *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). This is particularly true in constitutional cases, where "correction through legislative action is practically impossible." *Id.* at 828 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). Moreover, where a decision is "unworkable or ... badly reasoned, this Court has never felt constrained to follow precedent." *Id.* (quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944)).

Hill has proved to be badly reasoned, out of step with the Court's other First Amendment jurisprudence, and unworkable or destructive in practice. In the fourteen years since *Hill* was decided, this Court has considered many other important cases involving the freedom of speech, and yet no majority has ever relied on *Hill*'s central First Amendment analysis. This may be because, as Justice Kennedy observed at the time, *Hill* "contradict[ed] more than a half century of well-established First Amendment principles. For the first time, the Court approve[d] a law which bar[red] a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." 530 U.S. at 765 (Kennedy, J., dissenting). Also in the time since *Hill* was decided, a broad range of constitutional scholars has strongly criticized the decision. *See, e.g.*, *Symposium*, 28 Pepp. L. Rev. 747, 750 (2001) (Professor Laurence Tribe: "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.").[20]

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[20] *See also Symposium*, 28 Pepp. L. Rev. at 748 (Professor Michael McConnell: "*Hill v. Colorado* departed from standard First Amendment free-speech analysis ... [by permitting] a statute that makes it a criminal violation for people to engage in entirely peaceful, non-coercive, non-obstructive, quiet speech in a quintessential public forum; namely discussing an issue of undoubted public importance on the public streets and sidewalks."); Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) ("*Hill* is unusual in the other way, with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincing-

In practice, *Hill* has both emboldened legislatures to engage in discriminatory speech regulation and lulled some lower courts into nearly dismissive treatment of core First Amendment liberties—as well demonstrated by this case. *See, e.g.*, Pet. App. 110a-113a. Applied in this manner, *Hill* conflicts with longstanding, foundational precedents of this Court. *See, e.g.*, *Mosley*, 408 U.S. at 96 ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Grace*, 461 U.S. at 177 ("[G]overnment's ability to permissibly restrict expressive conduct [on public sidewalks] is very limited[.]"); *Jews for Jesus*, 482 U.S. at 574-575 (even in a non-public forum, "no conceivable governmental interest would justify" the "absolute prohibition of speech" involved in creating a "First Amendment Free Zone"); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (when proscribable "conduct occurs in the context of constitutionally protected activity ... precision of regulation is demanded" (internal quotation marks omitted)).

This problem is not limited to abortion speech or to the lower courts in this case. Courts throughout the country have used *Hill* to uphold laws that push the boundaries of First Amendment doctrine across a variety of categories of speech. *See, e.g.*, *Brown* v. *Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013) (relying on *Hill* to "reject any absolutist reading of content neutrality,

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ly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); Volokh, *The First Amendment and Related Statutes* 339 (4th ed. 2011) (*Hill*'s statement of the content-neutrality test "cannot be taken entirely literally" because it would conflict with numerous prior cases).

and instead orient our inquiry toward why—not whether—the Town has distinguished content in its regulation"); *Gibson* v. *Texas Dep't of Ins.-Div. of Workers' Comp.*, 700 F.3d 227, 233 (5th Cir. 2012) (statute banning use of particular advertising content held content-neutral under *Hill*); *Spingola* v. *Village of Granville*, 39 F. App'x 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to reject facial challenge to ordinance permitting public speaking at events only in "designated speaking areas," on ground that "there is at least one legitimate reason for the Ordinance, crowd control"); *Ross* v. *Early*, 758 F. Supp. 2d 313, 322 (D. Md. 2010) (relying on *McCullen I* to hold there is "no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message").

Freedom of speech is of central importance to our society. This Court can correct only a certain number of errors in particular cases. In the meantime, unclear or unsound precedents can sow confusion and error and chill the exercise of this fundamental right, harming both individuals and the Nation.[21] In light of these considerations, petitioners respectfully suggest that the Court may wish to consider using this case as an opportunity to revisit *Hill*.

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[21] *See, e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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AND
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In the Supreme Court of the United States

ELEANOR McCULLEN, *et al.*,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL
OF MASSACHUSETTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature adopted a fixed buffer zone that limited "entering" or "remaining" in areas next to the entrances of reproductive healthcare facilities. *See* Mass. Gen. Laws ch. 266, § 120E½ (2012). The Legislature took this action in response to 20 years of weekly, targeted protest at facilities across Massachusetts that blocked doors and driveways and made patients, staff, and passersby feel unsafe. The solution Massachusetts adopted, after other approaches had failed, struck the right balance: permitting safe passage over short stretches of sidewalk at facility entrances, while also preserving robust communication—in all forms—between advocates and patients on the streets and sidewalks surrounding facilities.

The questions presented are:

1. Whether Massachusetts's regulation of conduct in the area immediately around facility entrances to preserve public safety and patient access constitutes a permissible time-place-manner regulation under the Free Speech Clause of the First Amendment.

2. Whether the Court should decline petitioners' invitation to review and overturn *Hill v. Colorado*, 530 U.S. 703 (2000), where this case does not present the issues unique to *Hill*.

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STATEMENT

For more than two decades, Massachusetts has tried to address a problem: the preservation of safe access to reproductive healthcare facilities. Beginning in the late 1980s, access to these facilities was routinely blocked. *See, e.g., Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361, 1363-64 (Mass. 1990) ("*Operation Rescue*") (describing blockades of facility entranceways and lobbies). Moreover, Massachusetts "experienced repeated incidents of violence and aggressive behavior" at facilities, including a 1994 shooting in which two employees were killed and several other persons were injured. *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"); Joint Appendix ("J.A.") at 14.

To keep facility entrances clear and the surrounding streets and sidewalks safe, Massachusetts attempted several solutions, including targeted injunctions and a floating buffer zone. None worked. Finally, in 2007, Massachusetts adopted something that did work: a fixed buffer zone that kept a limited area immediately around facility entrances and driveways clear of everything but essential pedestrian traffic, ensuring safe access while also accommodating all forms of speech and expressive conduct within the hearing, sight, and presence of approaching patients.

A. History of Targeted Protest and Compromised Access at Massachusetts Reproductive Healthcare Facilities

In Massachusetts, reproductive healthcare facilities provide a wide range of important medical services to tens of thousands of patients every year, including

family planning, infertility services, mammography, treatment of sexually transmitted infections, and full gynecological care. J.A. 18, 61, 77. They also perform abortions. J.A. 77. However, more than two-thirds of patient visits are for preventive health care. J.A. 61, 77.

In the late 1980s, the streets and sidewalks around Massachusetts facilities became the focus of targeted protests.[1] *Operation Rescue*, 550 N.E.2d at 1363-64. Among other activity, individuals blocked facility entranceways and lobbies by lying on the ground or floor. *Id.* at 1363. They chained themselves to each other as well as to facility doors and property. *Id.*; *see also Commonwealth v. Filos*, 649 N.E.2d 1085, 1087 (Mass. 1995). They crowded patients seeking to enter the facilities and blocked their way. *Planned Parenthood League of Mass., Inc. v. Bell*, 677 N.E.2d 204, 206, 207 (Mass. 1997) ("*Bell*"). Indeed, the stated goal of the protests was to shut down facilities by physically blockading them. *Operation Rescue*, 550 N.E.2d at 1364.

The protests were not limited to one point of view. *Opinion of the Justices to the Senate*, 723 N.E.2d 1, 5 (Mass. 2000). Instead, advocates "on both sides of one of the nation's most divisive issues" frequently engaged

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[1] The focus of the protests were so-called "abortion clinics," that is, free-standing reproductive healthcare facilities. *Operation Rescue*, 550 N.E.2d at 1363. There is no evidence in the record that any of the protests targeted Massachusetts hospitals where abortions are also performed.

each other "in the areas immediately surrounding the State's clinics," creating "congested areas charged with anger." *Id.*

B. Massachusetts Adopts an Approach-Oriented Solution

The Massachusetts Legislature—"concerned about a history of violence" outside facilities and "the harassment and intimidation of women attempting to use such facilities"—enacted in 2000 the Massachusetts Reproductive Health Care Facilities Act ("2000 Act"). *McGuire v. Reilly*, 386 F.3d 45, 48 (1st Cir. 2004) ("*McGuire II*"). The Legislature investigated this concern "thoroughly," *McGuire I*, 260 F.3d at 44, and concluded that "existing laws did not adequately safeguard clinic staff, prospective patients, or members of the public." Pet. App. 95a. The Legislature heard consistent testimony that protesters at facilities throughout the Commonwealth regularly blocked facility access and harassed and intimidated patients and staff. The tactics used were aggressive: protesters screamed right in the faces of patients, their companions, and staff, shoved them, and even videotaped them. Among other evidence, the Legislature heard the following examples:

- A physician who worked at a Boston facility described arriving at work and being confronted daily by protesters who surrounded her car as she tried to enter through the garage, put their faces to her window, screamed her first name, called her a murderer, and videotaped her. J.A. 12.

- The clinic director for another Boston facility related the experience of one of her nurses, who tried to enter the facility garage but was blocked by protesters who stood between her and the swipe card machine that would allow her access, while two other protesters moved behind her car and prevented her from backing up. J.A. 16; *see* J.A. 20.

- Another staff member at the same facility encountered three protesters standing across the entrance with less than a foot between them. She was forced to squeeze between the protesters to gain entrance to the facility. J.A. 16-17.

- The clinic director of a Worcester facility testified that protesters caused "repeated problems" at the facility's driveway entrance. Protesters walked slowly across the driveway, sometimes standing still and blocking the entrance. J.A. 18.

- At least one car accident had occurred at the Worcester facility's driveway entrance, and the clinic director was concerned that others were "inevitable." J.A. 19.

- A volunteer described seeing a cab drive up to a Boston facility and immediately become "engulfed" by a large group of protesters. Inside was a woman in her mid-twenties and her elderly grandfather, who were trapped in the car for several minutes. They required assistance to get from the cab to the building, and the

grandfather, who walked with a cane, was shoved and nearly fell twice. J.A. 21-22.

The 2000 Act was a so-called "floating" buffer zone or "bubble zone" law, which was modeled on the one upheld by this Court just months before in *Hill v. Colorado,* 530 U.S. 703 (2000), but restricted far less space.[2] The 2000 Act contained three main provisions. *First*, the Act permitted peaceful protest right up to the doors of reproductive healthcare facilities but prohibited certain close approaches to unwilling listeners.[3] Specifically, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside an 18-foot radius extending from facility entrances if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 130a (quoting Mass. St. 2000, ch. 217, § 2(b)).

Second, the 2000 Act exempted four categories of persons from its coverage:

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[2] The Legislature initially considered a 25-foot fixed buffer zone and sought the opinion of the state's highest court as to its constitutionality. *Opinion of the Justices*, 723 N.E.2d at 1, 6; Pet. App. 127a. While the Supreme Judicial Court concluded that the proposed fixed zone was consistent with the First Amendment, *Opinion of the Justices*, 723 N.E.2d at 6, the Legislature ultimately chose to adopt a floating buffer zone like the one that had just been upheld in *Hill*. Pet. App. 128a-129a.

[3] The 2000 Act defined "reproductive healthcare facility" as a "place, other than within a hospital, where abortions are offered or performed." Mass. St. 2000, ch. 217, § 2(a). The revised Act uses the same definition but also excludes facilities "upon the grounds of" a hospital. Mass. Gen. Laws ch. 266, § 120E½(a) (2012).

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 130a-131a.

Third, the Act stated that these provisions only took effect "during a facility's business hours" and only if the defined zone was "clearly marked and posted." Pet. App. 131a.

The 2000 Act also included a separate provision that prohibited "knowing" attempts to obstruct, detain, hinder, impede, or block facility entrances. Mass. St. 2000, ch. 217, § 2(e).

C. Access and Safety Remain Compromised

The 2000 Act—with its emphasis on protecting against unwelcome close approaches—did not do enough to protect facility access and patient safety, which remained compromised. Essentially, the 2000 Act concentrated protest in a small area right in front of facility entrances. J.A. 69 (2000 Act was ineffective because "it's such close quarters" that "everybody is in everybody's face, no matter what"). Protesters stood still in facility doorways to pass out leaflets, crowding

the entrance. J.A. 44, 67, 122, 124. Sidewalk counselors massed in doors and driveways, attempting to approach patients until the very moment they entered facilities. J.A. 72-73. And counter-protesters jockeyed for their own positions, occasionally pushing and shoving, within the same 18-foot space. J.A. 26-27, 123. Whether they intended to or not, protesters created a wall of sometimes agitated or angry people in front of facility entrances, effectively blocking them. J.A. 26-27, 95-96, 123; Dkt. No. 53 at 17. Because there was still "a significant public safety and patient access problem," the Legislature revised the Act in November 2007. Pet. App. 165a; *see also* Pet. App. 97a ("Over time, legislators became concerned that the statute had failed to achieve its desired goals.").

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature heard testimony on both sides of the issue. For example, groups such as the American Civil Liberties Union and the Defending Dissent Foundation warned against the potential speech-chilling effects of bright-line enforcement tools, such as fixed buffer zones. J.A. 38-40, 64-66. But there was also extensive testimony from law enforcement and others that facility access was still being physically blocked under the 2000 Act's floating buffer zone. Indeed, access was often blocked merely by the lawful presence of too many people, too close to facility entrances. For example:

- Boston Police Department Captain William B. Evans—who served as police liaison to a Boston facility and protesters "on both sides of the issue"—testified that it was a "misconception" that the 2000 Act "prevents protesters from

going into that buffer zone." Rather, protesters "stand up right in front of the door." As he said, "A lot of them hold signs right there. As long as they stay stationary, you know, they can stand in front of that door."[4] J.A. 67, 122.

- Captain Evans described the action at facility entrances as so crowded and frenetic that it was like "a goalie's crease." J.A. 69.
- One volunteer for Planned Parenthood League of Massachusetts ("PPLM") painted a similar picture, telling the Committee that it seemed that certain protesters were "desperate to prevent people from entering the clinic." J.A. 72.
- A Boston facility volunteer agreed, testifying that the protesters were "moving closer and closer to the main door." J.A. 44.
- NARAL Pro-Choice Massachusetts submitted a survey of ten facilities located throughout the Commonwealth, including Amesbury, Lynn, Boston, Worcester, and Springfield. Six of the surveyed facilities described protesters as a "significant problem" for patients and staff, and two more reported the "semi-regular to regular presence of protesters." J.A. 54.

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[4] In addition, Captain Evans testified in this litigation that stationary protesters close to facility entrances would often "position themselves and their signs in such a way that it was difficult for anyone trying to enter or leave the facility to do so without coming into physical contact with protesters." J.A. 124.

Crowding conditions permitted under the 2000 Act were made worse by protesters willing to risk criminal prosecution under existing laws. For example:

- A patient advocate at an Attleboro facility described protesters walking back and forth across the driveway entrance. "Though prohibited from standing in the entrance of the driveway, they frequently stop there until threatened with police action." She also recalled "instances of picketers either slowing or speeding up to narrowly avoid being hit by cars driven by staff," and that patients had reported "feeling too intimidated by the pacing protesters to enter the property, and turning back." J.A. 41.

- Witnesses also described protesters sticking their heads and hands into open car windows and throwing literature into cars. J.A. 51; Pet. App. 142a.

- PPLM's security contractor described Boston protesters routinely placing four people "right on the curbstone of the buffer zone, so when people try to park there to let a patient out, they can't get out because they've got it blocked."[5] J.A. 86.

- PPLM's president told the Committee that patients' and staff members' fear of violence

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[5] The problems were not limited to Boston. For example, that same PPLM security contractor testified in this litigation that a Worcester protester would "stand in the middle of the driveway and try to stop people from proceeding up the driveway to the facility." J.A. 99.

required the hiring of guards and the installation of metal detectors at its facilities. In fact, she reported, PPLM spent $300,000 a year on security. J.A. 61.

- When asked if there was any evidence of women turning away from facilities "out of fear," PPLM's security contractor replied that, "on a weekly basis," he saw at least one or two women leave a Chestnut Hill facility because protesters "block the parking lot entranceway." Others agreed, with one volunteer testifying she saw "people circling [the facility] in the same car around and around," but "they never stop." J.A. 88-89.

Finally, the Legislature heard testimony that the 2000 Act put local police in a difficult enforcement position.[6] J.A. 67-70, 77-79. On the one hand, because the 2000 Act prohibited only unconsented approaches within the 18-foot zone, peaceful, stationary protest was entirely permissible within the zone, and police attempted to be respectful of that. J.A. 29 (police preferred to "mediate" disputes about buffer-zone violations). On the other hand, police could not use the Act to keep entrances clear because the law allowed individuals to station themselves and protest right at facility entrances; nor was the law effective in

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[6] Of course, this Court anticipated difficulties in enforcing floating buffer-zone laws like the 2000 Act. *See Hill*, 530 U.S. at 740 (acknowledging that floating buffer zones may be "inherently difficult to administer") (Souter, J., concurring); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 379 n.9 (1997) ("We suspect that these floating buffer zones would also be quite difficult for the district court to enforce.").

preventing patient intimidation and harassment[7] at facility entrances because the consent requirement was unenforceable as a "practical matter." J.A. 67, 68, 70, 77, 79, 122-23. As a result, police made few arrests. J.A. 68, 69. And even those did not generally result in convictions, J.A. 69, and were often for only the most blatant attempts at harassment and intimidation of patients and facility staff, such as the two women who would dress as Boston Police officers to encourage patients to consent to their approach. J.A. 71 (women had been arrested several times, but "they're back there every day, every Saturday"). From the law-enforcement perspective of Captain Evans, the only workable solution was a "fixed zone" that made clear—and clearly enforceable—who was, and who was not, supposed to be in the area immediately outside facility entrances.[8] J.A. 69-70.

As in 2000, the problems described to the Legislature in 2007 resulted from the activities of pro-choice advocates as well. For example, in the *McGuire* litigation, Captain Evans testified about a group of pro-choice protesters who gathered on the second Saturday

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[7] *See* Mass. Stat. 2000, ch. 217, § 1 (stating purposes of 2000 Act, including prevention of "congestion" around facilities and protection of patients' right to be free from "hindrance, harassment, intimidation and harm").

[8] Petitioners quibble with the testimony that the 2000 Act was difficult to enforce, citing testimony by law-enforcement officials that violations were "clear" and "routine." Pet. Br. at 7. But, in context, the testimony's plain import is that the officials regularly saw conduct within the buffer zone that they believed the Legislature had intended to correct, but the 2000 Act just proved to be the wrong vehicle to address that conduct. J.A. 69, 70.

of every month outside a Boston facility. J.A. 26-27. He described them as "young college age kids" who regularly yelled and screamed at pro-life protesters. J.A. 26-27. In fact, the pro-choice advocates were the ones who injected noise and vulgarity into the atmosphere immediately around facility entrances. J.A. 26-27.

And in this litigation, Captain Evans cited pro-choice protesters that his officers dubbed the "Pink Group," characterizing them as "particularly disruptive." J.A. 123. According to Evans, the Pink Group would "go into the 18-foot buffer zone and they would push, shove, and step on other people's feet in order to get a good position." J.A. 123. The combined presence of pro-choice and pro-life protesters in the buffer zone around the facility entrance "would effectively block the door." J.A. 123.

Indeed, one pro-choice group, the National Organization for Women, told the Legislature in 2007 that its counter-protests at facilities were unhelpful because they impeded patient access, and that it had ended them as a result. Dkt. No. 53 at 17. According to its testimony, "[p]atients entering these buildings don't distinguish between pro-choice and anti-choice protesters[;] they just see people crowded around the doorway that they need to walk through to get to their doctor's appointment." Dkt. No. 53 at 17.

D. Massachusetts Adopts an Access-Oriented Solution

In November 2007, the Legislature revised the original Act by deleting the floating buffer-zone provision that had proven ineffective and replacing it

with a new fixed buffer zone, focused on keeping a limited area around facility entrances safe and clear of all but essential traffic. Pet. App. 2a, 97a; Mass. Gen. Laws ch. 266, § 120E½(b) (2012). The revision was intended to "increase forthwith public safety at reproductive health care facilities" and was "necessary for the immediate preservation of the public safety." Mass. St. 2007, ch. 155.

The revised Act makes it unlawful to "knowingly enter or remain on a public way or sidewalk adjacent to a [facility] within a radius of 35 feet from any portion of an entrance, exit or driveway of a [facility]." Mass. Gen. Laws ch. 266, § 120E½(b). To put it in concrete terms, that distance is just under the length of two parking spaces[9] and marks a point only seven seconds away from facility doors. *See Burson v. Freeman*, 504 U.S. 191, 210 (1992).

The other provisions of the 2000 Act were not changed. The Act continues to apply only during a facility's business hours and only if each buffer zone is "clearly marked and posted." Mass. Gen. Laws ch. 266, § 120E½(c). In addition, the same four categories of persons are still exempt: (1) persons entering or leaving the facility; (2) clinic employees or agents acting within the scope of their employment; (3) municipal agents acting within the scope of their employment; and (4) persons crossing through the buffer zone solely to

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[9] *See, e.g.*, City of Springfield Zoning Ordinance (Aug. 26, 2013), Article 7, § 7.1.41, available at http://www3.springfield-ma.gov/planning/fileadmin/Planning_files/Zoning_2013_Documents_Images/Final_5_28_13_Effective_8_26_13_JTM.pdf (parking spaces must be at least 18-feet deep, or 16-feet deep for compact cars).

reach a destination other than the facility. *Id.* § 120E½(b)(1)-(4). The statute also carried over language from the 2000 Act prohibiting "knowing" attempts to obstruct, detain, hinder, impede, or block facility entrances. *Id.* § 120E½(e).

The Massachusetts Attorney General's Office ("AGO") issued guidance to law enforcement and facility managers on the "primary provisions" of the revised Act. J.A. 91; *see also* J.A. 91-94 (sample guidance letter); Pet. App. 98a, 119a-120a. Echoing the revised Act's plain language, the AGO described it as creating fixed "no-enter" zones in defined areas immediately around facility entrances and driveways. J.A. 91.

As for the revised Act's exemptions, the AGO emphasized that they did not permit unfettered conduct within the buffer zone. J.A. 93-94; *see, e.g.*, J.A. 93 ("The first exemption—for persons entering the clinic or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic."). Rather, the exemptions simply allowed those who had to have access to the area immediately around facility entrances—patients, pedestrians, employees, contractors, utility workers and first responders—to get to where they needed to go. J.A. 93-94. But they did not allow exempted individuals to engage in the kind of conduct—*e.g.*, stopping in the buffer zone to

engage in what the Court of Appeals had earlier termed "partisan speech"[10]—that had proved obstructive in the past. J.A. 93.

For example, the AGO explained that an individual could cross the buffer zone "to reach and speak with someone outside the zone (perhaps to engage in lawful protest, other speech or prayer) or to travel on to another place altogether." J.A. 93. However, that individual could not "do anything else within the buffer zone," including stopping to "express[] their views about abortion" or to "engag[e] in other partisan speech." J.A. 93-94.

E. The Revised Act Has Improved Public Safety and Facility Access While Preserving Robust Opportunities for Speech Outside Facilities

Following the enactment of the fixed buffer zone, the areas immediately around facility entrances finally

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[10] The phrase "partisan speech" originated with the Court of Appeals in *McGuire II*. In reviewing the Commonwealth's enforcement policy under the 2000 Act, the court noted that the AGO's guidance letters had "clearly construed" that statute's employee exemption to "exclude pro-abortion or partisan speech from the term 'scope of their employment.'" *McGuire II*, 386 F.3d at 52 n.1. Thus, the AGO took the position as early as 2000 that the exemption did not permit employees to "engage in counter-protests, counter-education, or counter-counseling against anti-abortion views" within the buffer zone. *Id.* at 52. In 2007, the AGO used the Court of Appeals' phrase—"partisan speech"—to convey the same message with respect to the identical employee exemption in the revised Act: that it was a limitation on facility employee conduct and did not permit the same types of activities that had congested facility entrances for years.

function as they should. Patients can readily enter the facilities, by foot or by car, to access the many medical services offered there. J.A. 126 (after the Act was revised, the area around facilities is "much more orderly" and there have been "fewer confrontations"). And interested individuals can—as they have every week for more than twenty years—effectively proffer their messages outside facilities and within the sight, hearing, and presence of their target audience. Pet. App. 23a ("[t]he record makes plain that communicative activities flourish" outside facilities).

In Boston, for example, at least a dozen protesters, and sometimes many more, regularly appear outside a PPLM facility on Commonwealth Avenue. Pet. App. 6a; J.A. 129-30; *see also* J.A. 132 (Ms. McCullen engages in sidewalk counseling every Tuesday and Wednesday); J.A. 175 (Ms. Zarella protests on Saturdays and some Wednesdays); J.A. 125, 271 (on second Saturday of each month, as many as 30 to 40 protesters gather outside the Boston facility, and on Good Friday there are as many as 70). The protesters stand near the front entrance of the facility carrying signs, praying, singing, chanting, and speaking with or calling out to those who pass by and those who are entering the facility. Pet. App. 6a-7a (describing scene); Pet. App. 41a-47a (same); J.A. 300, 303-05 (photographs of protesters outside Boston facility). They often ring the buffer zone and can be seen and heard by those within it. Pet. App. 46a; J.A. 300, 304. They can even be heard from inside the facility. Pet. App. 46a-47a.

Protesters outside the Boston facility also pass out leaflets and handbills to those approaching or passing by the facility. Pet. App. 41a-42a, 43a, 46a. And they

have close, quiet conversations with individuals on the surrounding sidewalks. Pet. App. 47a (investigator observed group of three sidewalk counselors engaging young woman); J.A. 126 ("[p]rotesters continue to have close contact with patients and others approaching the clinic"); J.A. 162-63 ("not unusual" for men accompanying women to the facility to confide in protester); J.A. 306 (photograph of close conversation between protesters and patient). In fact, protesters have acknowledged repeated success in conveying their message in Boston, with one protester testifying that she convinced about 80 women not to terminate their pregnancies since the revised Act took effect in 2007. Pet. App. 7a, 41a-42a, 47a. Indeed, the record contains a photograph of that protester—petitioner Eleanor McMullen—engaging in a quiet conversation with a young woman on the sidewalk outside the buffer zone, which resulted in the woman leaving the facility in a car with her. J.A. 269-71 (describing encounter); J.A. 306 (photograph).

Protesters also effectively convey their messages at facilities in Worcester and Springfield.[11] Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). A regular group of protesters appears outside those facilities, with their numbers swelling to as many as 100 on occasions such as the semi-annual "40 Days for Life." J.A. 228, 229-30, 237-40, 263-65 (Worcester); J.A. 204, 206-13 (Springfield); J.A. 301, 309, 310 (photographs); *see also* J.A. 215 (Ms. Clark protests in Worcester two or three times per week); J.A. 198 (Dr.

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[11] While petitioners have chosen to focus on only three facilities, patient access was a state-wide problem affecting almost a dozen facilities scattered throughout the Commonwealth. J.A. 54.

Shea protests on Friday). Their preferred activity—getting as close as possible to patients until the moment they enter the facility—is proscribed by geography: the primary entrances for both facilities are reached by private driveway and parking lot. Pet. App. 51a, 60a; J.A. 114, 117. Nonetheless, protesters are able to display their signs, pass out literature, pray, sing, call out, and demonstrate, all within the sight and hearing of patients. Pet. App. 50a-57a, 59a-63a; J.A. 114-15, 117-18, 272-78. Despite the physical layout of the facilities, they even have close, quiet conversations with patients. J.A. 206, 208, 255-56, 259-61, 272-73. For example, there is a nun who regularly engages in sidewalk counseling at the Worcester facility who is particularly effective at drawing patients into quiet conversations. J.A 259-60. As a result of her work, and that of others, Worcester protesters have convinced a number of patients to leave the facility and join them at pro-life organizations like Problem Pregnancy. J.A. 259-61.

But petitioners have insisted that they need additional access to facility patients. Indeed, each petitioner has professed a need to be only a few feet from facility entrances, stating that, if the current buffer zone were lifted, they would once again take positions directly in front of facility doors or right next to driveways. *See, e.g.,* J.A. 217 (if buffer zone were lifted, Ms. Clark would stand "on the public sidewalk adjacent to the concrete walkway directly in front of the opening in the fence because this is the closest point to the main door that is public property"); J.A.

252 (with no buffer zone in place, Mr. Bashour would stand "directly in front of the main door").[12]

F. The Court of Appeals Upholds the Act

The United States Court of Appeals for the First Circuit has addressed the constitutionality of the Commonwealth's buffer-zone statutes four times, upholding the laws each time. In the first round of litigation, the court rejected both facial and as-applied challenges to the 2000 Act's "floating" buffer zone. *See McGuire I*, 260 F.3d 36; *McGuire II*, 386 F.3d 45. And this Court denied certiorari. *McGuire v. Reilly*, 544 U.S. 974 (2005).

With the Act's 2007 revision came a new round of litigation. Once again, petitioners brought both facial and as-applied challenges, which were tried separately. Pet. App. 125a. Following a bench trial on a stipulated record—which traced the extensive history of violence, harassment, and obstruction outside Massachusetts facilities, as well as the Commonwealth's efforts to address it—the District Court rejected the facial challenge. Pet. App. 123a-124a, 210a. The Court of Appeals affirmed, finding that the revised Act was a "permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety." *McCullen v. Coakley*, 571 F.3d 167,

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[12] *See also* J.A. 176 (Ms. Zarella's earlier, preferred routine, was to stand "in one place" close to the "recessed walkway leading to the clinic entrance"); J.A. 189 (Mr. Smith's earlier, preferred routine was to "stand stationary on the public walkway directly in front of the clinic entrance"); J.A. 200 (Mr. Shea would prefer to stand "a few feet" from driveway entrances).

184 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1881 (2010) ("*McCullen I*"); *see* Pet. App. 95a-98a, 118a.

Applying the traditional time-place-manner test articulated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court of Appeals concluded that the Act was content neutral because the legislative record demonstrated that it was "in service to a legitimate governmental interest unrelated to expressive activity." Pet. App. 102a, 104a-105a. The court rejected as unsupported petitioners' argument that the Legislature's neutral justifications were mere pretext. Pet. App. 102a-104a. It also rejected petitioners' argument that features of the Act—including its employee exemption—constituted content-based or viewpoint-based discrimination, reasoning that "the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference." Pet. App. 105a.

As for narrow tailoring, the Court of Appeals found that the Act did not, under *Ward*, burden substantially more speech than necessary. Pet. App. 108a-109a. The court noted that the Legislature had "labored" to balance "First Amendment concerns with public safety concerns" and had "mulled" the "advantages and disadvantages of variously configured buffer zones." Pet. App. 109a. Given that unique history and the deference traditionally afforded such legislative judgments, the court stated that it simply could not "say that the 2007 Act is substantially broader than necessary." Pet. App. 109a.

The case then returned to the District Court for a bench trial on petitioners' as-applied challenge. The District Court concluded that, with one exception, petitioners' as-applied claims were identical to those raised and resolved in the facial challenge. The exception, and the only triable issue, was whether the revised Act provided petitioners with adequate, alternative means of communication at the three PPLM facilities in Boston, Worcester, and Springfield. Pet. App. 5a. After making extensive findings of fact, the District Court concluded that it did. Pet. App. 6a. Once again, the Court of Appeals agreed, concluding that the "record makes plain that communicative activities flourish at all three places." *McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013) ("*McCullen II*"); Pet. App. 23a. At each facility, the court found, petitioners protested within the sight, hearing, and presence of their intended audience. Pet. App. 23a. Relying as much on *Madsen* and *Schenck* as it did on *Hill*, the Court of Appeals ultimately determined that the Act was a "content-neutral, narrowly tailored time-place-manner regulation that protects the rights of prospective patients and clinic employees without offending the First Amendment rights of others." Pet. App. 3a; *see Hill*, 530 U.S. 703; *Schenck*, 519 U.S. 357; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

SUMMARY OF ARGUMENT

More than 20 years of experience in Massachusetts has demonstrated that the areas immediately around facility doors and driveways have been congested, and even unsafe. The revised Act is a traditional legislative response to that long-standing problem: it reduced the

traffic around facility entrances. Under the Act, only essential pedestrian traffic is allowed in these critical areas and even that traffic has to keep moving. Because the Act is justified solely by legitimate governmental interests in public safety and healthcare access, the Act is properly viewed as a neutral time-place-manner restriction on conduct that has a limited, incidental effect on petitioners' preferred method of communication. It should join the long line of similar restrictions upheld by this Court to protect polling places, schools, national parks, state fairs, and even utility poles. *See Schenck*, 519 U.S. 357 (abortion facilities); *Madsen*, 512 U.S. 753 (same); *Burson*, 504 U.S. 191 (polling places); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (national parks); *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fairs); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (schools); *cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (indicating possible approval of military funeral buffer zones).

That same 20 years of experience also demonstrates that the revised Act's fixed buffer zone is the only solution that worked. Essentially, Massachusetts engaged in a lengthy period of trial and error, testing various solutions to an acknowledged public-safety problem. Nothing kept entrances clear and sidewalks safe until Massachusetts adopted the Act's fixed buffer zone. This long history is ample evidence that Massachusetts tailored its solution to fit the problem at hand, and that the revised Act is not overbroad. *See Madsen*, 512 U.S. at 768-70 (history of targeted protest and ineffective injunctions justified 36-foot buffer

zone); *Burson*, 504 U.S. at 200, 206-07 (history of voter fraud justified 100-foot buffer zone).

Moreover, the Act permits petitioners to protest at their preferred location and in the sight, hearing, and presence of their preferred audience. That is, they continue to protest outside facilities that provide abortion services, just not right in the doors. They continue to offer information and conversation to patients and passersby, just a few seconds away from those entrances. In short, there is robust speech on the topic of abortion happening every day outside Massachusetts facilities. But now, under the revised Act, patients and pedestrians have safe use of short stretches of sidewalk needed to access facilities and to get to where they are going.

Finally, this case is not *Hill v. Colorado*. In *Hill*, the State expressly restricted speech—*i.e.*, "protest," "education," and "counseling"—in areas extending 100 feet from all medical facility entrances. Unlike the law in *Hill*, the revised Act does not regulate unwelcome "approaches," and it does not shield the "unwilling listener." It does not create a protective "bubble" around listeners, and it does not guarantee personal space on public streets and sidewalks. What the Act does regulate is traffic and congestion in a much smaller area outside facility entrances to ensure public safety and patient access. Simply put, this is a different case, and it is not an appropriate vehicle for reconsidering any of the unique features of *Hill*.

ARGUMENT

I. THE FIXED BUFFER ZONE IS A CONTENT-NEUTRAL, NARROWLY TAILORED TIME-PLACE-MANNER RESTRICTION ON CONDUCT AND LEAVES OPEN AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION

The revised Act prohibits "entering or remaining" within a limited area directly in front of facility entrances and driveways. It does so to keep those entrances open and clear of all but essential foot traffic, in light of more than two decades of compromised facility access and public safety. *See Burson*, 504 U.S. at 196, 200-07 (long history of voting fraud justified 100-foot buffer zone that restricted even political speech, "the essence of self-government"); *see also Symposium*, 28 Pepp. L. Rev. 747 (2001) (Prof. Michael W. McConnell did not "dispute for a minute" that state has authority to protect those entering healthcare facilities from, among other things, "coercive activity" and "obstruction"). Because the Act is not directed at any particular message and because it is narrowly tailored to serve only recognized and significant governmental interests while permitting ample other opportunities for communication, it should join the long line of time-place-manner restrictions upheld by this Court as consistent with the First Amendment. *See generally Schenck*, 519 U.S. 357; *Madsen*, 512 U.S. 753; *see also Ward*, 491 U.S. 781; *Clark*, 468 U.S. 288; *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderly v. State of Florida*, 385 U.S. 39 (1967).

A. The Act is a Lawful Time-Place-Manner Restriction on Conduct That Compromises Patient Access and Public Safety

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *see Heffron*, 452 U.S. at 647 (same).[13] "A group of demonstrators," for example, "could not insist on the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox*, 379 U.S. at 555; *see also Cameron*, 390 U.S. at 617. This Court has long permitted laws that regulate conduct to preserve public order and safety even if the laws, like the Act, incidentally affect the time, place, or manner of protected speech.[14]

Such restrictions must survive the familiar three-part test articulated in *Ward v. Rock Against Racism*. That is, they must be 1) "justified without reference to the content of the regulated speech," 2) narrowly tailored "to serve a significant government interest," and 3) leave open "ample alternative channels for

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[13] *See also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983); *Adderly*, 385 U.S. at 47-48; *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953).

[14] *See Schenck*, 519 U.S. 357; *Madsen*, 512 U.S. 753; *Ward*, 491 U.S. 781; *Clark*, 468 U.S. 288; *Cameron*, 390 U.S. 611; *Adderly*, 385 U.S. 39.

communication of the information." *Ward*, 491 U.S. at 791. The Act satisfies all three parts of the *Ward* test.

B. The Act is Content Neutral

By its terms, the Act regulates only conduct: "entering or remaining" within a marked area in front of facility entrances during business hours. Thus, the Act incidentally regulates the place and time of protected speech. But its purpose is not to create "speech exclusion zones," as petitioners assert.[15] Pet. Br. at 19. The Act does not attempt to regulate passing leaflets or handbills, displaying signs, or "engaging in oral protest, education or counseling." *Cf. Hill*, 530 U.S. at 707 n.1. It does not protect unwilling listeners or prefer categories of speech. *Cf. id.* at 708. It does not even regulate "approaches" for the purposes of speech, as the 2000 Act did. Mass. St. 2000, ch. 217, § 2(b). The Act does not directly regulate speech because speech was not the problem the Legislature was trying to correct. Rather, the decades-long problem was the physical blocking of facility doors and driveways and compromised public safety. *See* Pet. App. 97a, 137a-149a; *see also McGuire I*, 260 F.3d at 39; *Operation Rescue*, 550 N.E.2d at 1363-64.

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[15] Quite the opposite, the Legislature was so concerned about preserving the right balance between protected First Amendment freedoms and the need for order on public streets and sidewalks that it created a private action for equitable relief under the Act for "any person whose rights to express their views, assemble or pray near a reproductive health facility have been violated or interfered with." Mass. Gen. Laws ch. 266, § 120E½(f); *see also* J.A. 37, 47, 74, 75.

With the focus firmly on protecting safety and access, the Act is content neutral. As the record establishes, the Legislature did not adopt the restrictions because it disagreed with any underlying message. *Madsen*, 512 U.S. at 763 ("principal inquiry" in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech"); *see also Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293. Rather, the Legislature's justifications were rooted in public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways. *See, e.g.*, Mass. St. 2007, ch. 155 (revision intended to "increase forthwith public safety at reproductive health care facilities"); Pet. App. 102a (finding that the law was enacted "in response to legitimate safety and law enforcement concerns").[16] And each of the concerns cited by the Legislature has been acknowledged by this Court as a significant, content-neutral justification for restrictions on the time, place, or manner of speech. *See, e.g., Schenck*, 519 U.S. at 376 ("ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights and protecting a woman's freedom to seek pregnancy-related services"

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[16] Individual legislators made plain that they were not acting because they favored any particular view on the abortion controversy, but because they were concerned about access and safety around facilities. For example, Senator Gale D. Candaras urged her colleagues "to resist the notion that this legislation is a pro- or anti-choice bill, or that it is intended to silence protesters." J.A. 47. Rather, she stated, "[t]his is a public safety measure" that is "aimed at conduct, not speech." J.A. 47; *see also* J.A. 37, 74-75, 81.

was "certainly significant enough" to justify fixed buffer zone); *Madsen*, 512 U.S. at 767-68 (same interests cited, in addition to "protecting a woman's freedom to seek lawful medical or counseling services"); *Cox*, 379 U.S. at 554-55 ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement."); *United States v. Grace*, 461 U.S. 171, 182 (1983) ("total ban" on certain expressive activity may have been justified on showing that activity "obstructed the sidewalks or access to the [b]uilding").

Petitioners themselves agree that Massachusetts has a "legitimate interest" in "clearing out the bottleneck immediately adjacent to" clinic doors and driveways. Pet. App. 178a; *see also* Pet. Br. at 35. Nonetheless, they argue that Massachusetts cannot advance its interest because that would "effectively disfavor" speech on the topic of abortion. Pet. Br. at 25. But a regulation that "serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. In *Heffron*, for example, Minnesota's restriction on state-fair solicitation was content neutral because it was justified by the State's interest in "managing the flow of the crowd," despite its disproportionate effect on ISKCON members and their religious practice of Sankirtan. 452 U.S. at 649-54 & n.13. Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), an ordinance prohibiting targeted residential picketing was content neutral, even though it was enacted in response to a pro-life picketing strategy. *Id.* at 476, 482. And in *Cameron*, a picketing prohibition that prevented obstruction of public buildings and property was content neutral,

despite being passed "in the context of" pickets at a county courthouse protesting racial discrimination in voter registration. 390 U.S. at 620-22.

The Act is, therefore, a legitimate legislative response to the unique record of regular, targeted protest at Massachusetts facilities, involving primarily—although not exclusively—pro-life advocates: that is, the weekly scrum in front of facility entrances, in which protesters crowded doorways, blocked driveways, surrounded cars, impersonated police officers, and jostled protesters and facility employees. *See Schenck*, 519 U.S. at 867 ("a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible"); *Madsen*, 512 U.S. at 763 ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order."). Because the record demonstrates that the Act was focused exclusively on protecting Massachusetts streets and sidewalks from the public-safety threat that arose when facility entrances became congested and impassable—rather than restricting the topic of protest, or the message of particular protesters—it is "properly analyzed as content neutral." *Boos v. Barry*, 485 U.S. 312, 320 (1988); *see also Renton v. Playtime Theatres*, 475 U.S. 41, 48-49 (1986) (same).

1. That the Act Protects Access Only to Facilities Does Not Make It Content- or Viewpoint-Based

The fact that the Act protects access only to facilities does not change the analysis. Pet. Br. at 23-27. The Legislature had more than twenty years of

evidence that the problem it was seeking to correct—compromised access and public safety—only occurred outside freestanding facilities that provide abortions, and only during their business hours.[17] Petitioners cite no evidence that similar problems existed elsewhere, *e.g.*, outside Massachusetts hospitals that provide abortion-related services. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson*, 504 U.S. at 207 (rejecting argument that buffer-zone statute was underinclusive); *Renton*, 475 U.S. at 52-53 (similar); *see also Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

Petitioners object to the Legislature's "targeted" approach, arguing that it burdens only the topic of abortion. Pet. Br. at 24-25. But again, this objection ignores the record. The conduct that the Legislature sought to regulate occurred only outside facilities. And it was that conduct—the physical obstruction of facility entrances—and not any particular topic or viewpoint that the Legislature excluded from the buffer zone.[18]

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[17] This does not mean, of course, that the only expressive activity that could conceivably occur outside facilities would be abortion-related. For example, a labor union seeking to organize facility employees would "typically" seek to communicate with the employees "immediately outside their workplace." Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* at 5-6.

[18] That is the crucial distinction here. In the cases cited by petitioners, the plain language of the relevant laws gave explicit

Ward, 491 U.S. at 791; *cf. Boos*, 485 U.S. at 320; *Renton*, 475 U.S. at 48-49. It would be odd, indeed, if the First Amendment were read to render government helpless to address effectively a recurrent public-safety problem because it occurred only at a specific category of "place." *See Madsen*, 512 U.S. at 762-64 (rejecting similar argument); *see also Snyder*, 131 S. Ct. at 1218 ("[w]e have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral").

Moreover, petitioners argue that the Act must be overinclusive to be content neutral. Pet. Br. at 23-24. To be even-handed, they contend, the Legislature should have restricted more speech and established buffer zones at all healthcare facilities, despite the lack of any record showing similar problems at hospitals or other medical offices. Putting aside the obvious tension that this would create with the narrow-tailoring prong of the *Ward* test, the petitioners themselves note that

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preference to one topic over another. Pet. Br. at 25; *see Carey v. Brown*, 447 U.S. 455, 465 (1980) (statute prohibited residential picketing, except "peaceful labor picketing"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (ordinance prohibited pickets or demonstrations within 150 feet of schools except "peaceful picketing of any school involved in a labor dispute"). It was the preference that made the statutes unconstitutional, not the fact that picketing was being regulated outside a specific "place." *See Mosley*, 408 U.S. at 98 ("This is not to say that all picketing must always be allowed. We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant government interests."); *see also Frisby*, 487 U.S. 474 (upholding ban on targeted residential picketing).

Massachusetts does protect access to other health facilities. Pet. Br. at 36 & n.10 (citing Mass. Gen. Laws ch. 266, § 120E). However, that law is somewhat less protective than the Act: requiring notice to the alleged perpetrator that his or her conduct is unlawful. Mass. Gen. Laws ch. 266, § 120E. And that makes sense: there is no evidence that hospitals have encountered the same kind of access problems as facilities. Taking the statutory scheme as a whole, therefore, it is clear that Massachusetts is simply being responsive to different problems in different places.[19]

Moreover, federal, state, and local governments have traditionally been permitted to exercise their police powers to address issues of public safety and welfare that arise in specific "places." They have determined, for example, that schools could not function properly if disruptive demonstrations were permitted outside their doors during school hours. *Grayned*, 408 U.S. at 116, 119 ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.'"). They have also decided that hospital patients require a calm environment in which to recuperate and heal. *Madsen*, 512 U.S. at 772 (citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 &

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[19] To the extent that petitioners offer the argument as evidence of a "discriminatory governmental motive," it is unavailing. *Hill*, 530 U.S. at 731. The courts below have already rejected the implication that the Legislature's stated justifications for the Act were pretextual, finding that it was "unsupported by any record evidence." Pet. App. 167a-168a. Moreover, this Court does not generally search for pretext, particularly where, as here, the purpose of the law is clearly stated and supported by the record. *See, e.g., Cameron*, 390 U.S. at 620-21.

n.12 (1979)). Polling places must be kept clear to avoid potential voter fraud. *Burson*, 504 U.S. 191. And traffic at crowded state fairs must be kept moving. *Heffron*, 452 U.S. 640. Moreover, governments must continue to have the flexibility to address new concerns that arise at specific locations or events. *Cf. Snyder*, 131 S. Ct. at 1227-28 ("the real significance" of new military funeral buffer zones is that "their enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order") (Alito, J., dissenting). It would be a significant incursion on traditional police powers to require government to curb its peace-keeping efforts simply because a particular group of protesters insisted on using only a specific "place"—here, the entrances to reproductive healthcare facilities—to communicate the group's message.[20]

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[20] Relying on *United States v. O'Brien*, 391 U.S. 367 (1968), petitioners claim that the Act is content based because "[t]he 'inevitable effect' of [its] targeted approach is that virtually all of the speech burdened by the Act will be speech about abortion." Pet. Br. at 24. *O'Brien* does not support their proposition. Rather, *O'Brien* holds that, while an alleged illicit legislative motive is not a proper basis for voiding an otherwise constitutional statute, that principle is simply not implicated in cases where "the inevitable effect of a statute *on its face* . . . render[s] it unconstitutional." 391 U.S. at 384 (emphasis added). Petitioners' other citations are similarly flawed. Contrary to their characterizations, for example, both *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), involved direct speech restrictions that facially discriminated against certain topics of speech and against certain speakers. *See Sorrell*, 131 S. Ct. at 2663 ("On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."); *R.A.V.*, 505 U.S. at 391 ("terms" of ordinance "[made] clear that [it] applie[d] only to 'fighting words'

In essence, petitioners ask that this Court adopt a kind of "reverse" content discrimination. That is, petitioners contend that Massachusetts cannot exercise its police power to regulate conduct near abortion clinics because they only want to protest at abortion-clinic entrances. However, the Commonwealth's traditional, content-neutral interest in secure sidewalks and safe access to healthcare does not shift based on place. And petitioners' interest in speaking on a specific topic at a specific place does not trump that interest. *Madsen*, 512 U.S. at 762; *Burson*, 504 U.S. at 194; *Heffron*, 452 U.S. at 653-54. The Court has never embraced petitioners' view that a law serving important purposes unrelated to the content of expression must yield where challenged by speakers who claim a special need to protest at a particular place.[21] Such a rule would require courts to weigh the relative importance of the message particular protesters wish to convey—and their need to convey it in a specific place—and invalidate laws based on the weight the court assigns to the speaker's interest. This would, of course, "create preferences that threaten

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that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'").

[21] In *Heffron*, for example, the Court rejected the petitioners' claim of preferred speech rights: "None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize." 452 U.S. at 652-53.

First Amendment values to an even greater extent than the problems they are designed to solve." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 81 (1987).

2. The Facility Employee Exemption Is Not Viewpoint Discrimination

The statutory exemption for facility employees and agents does not undermine the content neutrality of the Act. Mass. Gen. Laws ch. 266, § 120E½(b)(2). That exemption does not favor any particular speaker or topic of speech. Pet. Br. at 27-32. Indeed, none of the four exemptions—for patients, passers-by, employees, and contractors and first responders—favors any speech whatsoever. Rather, the exemptions are focused on conduct.

To begin with, some kind of exemption was required for individuals needing to enter or leave facilities. The Act categorically prohibits "entering" or "remaining" in the buffer zone. Thus, the Act had to make clear that employees—and patients, pedestrians, contractors, utility workers, and first responders—could cross the buffer zone to get to where they needed to go. Mass. Gen. Laws ch. 266, § 120E½(b)(1)-(4). This is, of course, entirely consistent with the Act's purpose of keeping traffic flowing in the areas immediately around facilities.

But the Act also makes clear—on its face—that even exempted individuals cannot engage in the kind of conduct that previously resulted in congestion and compromised facility access. So, for example, pedestrians using the sidewalk are permitted to cross through the buffer zone but "solely for the purpose of

reaching a destination other than [the] facility." *Id.* § 120E½(b)(4). Essentially, the Act requires pedestrians to keep moving and not stop in the buffer zone to engage with anyone inside or outside the zone. Otherwise, they are not "solely" proceeding to a "destination other than such facility." *Id.* The same is true of patients and others "entering or leaving" the building. *Id.* § 120E½(b)(1). That is all they are permitted to do in the buffer zone, enter or leave. Like pedestrians, they have to keep moving.

Similarly, the Act permits facility employees, municipal agents, and tradespeople to physically cross and remain in the buffer zone. *Id.* § 120E½(b)(2)-(3). But again, the Act limits their conduct. They can only do so when acting "within the scope of their employment." *Id.* That is, the Act permits them to get on with their jobs. But it does not permit them to engage with protesters or conduct their own counter-protests in the buffer zone, which would have the effect of blocking facility access.[22] The limitation that such employees act "within the scope of their employment" reflects the Legislature's judgment that it cannot be their job—and, incidentally, would likely be

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[22] Petitioners' allegations about facility employee conduct—which were insufficient to sustain their as-applied viewpoint-discrimination challenge, *see* Pet. App. 86a—center on expressive conduct taking place *outside* the buffer zone. Pet. Br. at 14 (asserting that escorts "surround" patients to prevent them from communicating with petitioners, and that they "raise and lower their arms" to prevent petitioners from offering literature). Of course, anyone—advocates, employees, and passersby—can engage in all forms of lawful expressive activity outside the buffer zone.

counterproductive to their employer's interest—to engage in conduct that is either obstructive or unsafe.[23]

The same judgment is echoed in the AGO's guidance letters to law enforcement and facility officials: the exemptions permit only limited conduct within the buffer zone. J.A. 93-94; *see, e.g.*, J.A. 93 ("The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic."). The reference to "partisan speech" in the letters did not transform the conduct-oriented exemptions into message-oriented exemptions. Pet. Br. at 33. When the AGO warned that facility employees and others could not stop in the buffer zone to engage in "partisan speech," it was intended to address the kind of conduct that had proved obstructive at facility entrances in the past. *See McGuire II*, 386 F.3d at 52 & n.1 (under identical provision of the 2000 Act, AGO consistently interpreted employee exemption to exclude what the court termed "partisan speech" activities, such "as counter-protests,

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[23] It is worth noting that the Supreme Judicial Court has not yet had an opportunity to construe the Act's "scope of employment" requirement. Petitioners paint an extreme picture of escorts actively engaging in counter-counseling while they are in the buffer zone. Pet. Br. at 28. As the record stands, however, no court has found that to be true, *see* Pet. App. 86a, and no court has determined that such activity would actually be within the escort's "scope of employment." *See, e.g., McGuire II*, 386 F.3d at 52 (noting that AGO had construed 2000 Act to prohibit this kind of activity by facility employees); Pet. App. 173a (same). Nonetheless, if an authoritative construction of the Act from the Commonwealth's highest court would avoid a constitutional violation, this Court should certify the question. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-96 (1988).

counter-education or counter-counseling against anti-abortion views"). That is, employees could enter and remain in the buffer zones to do their jobs—escorts could help patients access the facility, and nurses could wheel patients to waiting cars, because their conduct would facilitate patient safety and health—but they could not stop and add to the congestion that had blocked facility entrances for years. J.A. 93 (exemption permits employees "to assist in protecting patients and ensuring their safe access").

Given both the Act's plain language and the AGO's conduct-oriented interpretation, enforcement of the Act is focused on what individuals are *doing*, not what they are *saying*. For example, if a pro-life advocate walked across the buffer zone to engage in sidewalk counseling with a person located on the other side, that conduct would be permitted under the Act. J.A. 93 (guidance states that "an individual may cross through the buffer zone to reach and speak with someone outside the zone"); J.A. 128 (testimony of Boston Police officer, enforcing the Act pursuant to the AGO's guidance letters). However, if that same advocate—or for that matter, a pro-choice advocate—repeatedly walked back and forth across the buffer zone, with no obvious destination on the other side, that act would be prohibited. And it would be prohibited even if the advocate was just walking and not engaging in any type of expressive activity. The same would be true if multiple advocates criss-crossed the zone, effectively blocking it, or if advocates put themselves in the path of entering patients while ostensibly trying to reach the other side of the zone.

In short, the entire Act, even its exemptions, is focused on conduct, not speech. And the plain language of the Act makes clear that no one—not employees, not pedestrians, not protesters—can block access to facilities or impede traffic on the sidewalks. Thus, the Act is an even-handed, content-neutral solution to a long-standing and previously intractable problem.

3. The Facility Employee Exemption Is Severable

Petitioners sought certiorari largely based on the facility employee exemption, which they claimed created "selective speaker exclusion zones." Pet. at 3. Of course, as discussed above, the employee exemption does nothing of the kind. Nonetheless, any constitutional deficiency caused by the exemption should not result in invalidation of the entire Act. Instead, were this Court to conclude that the employee exemption made the Act infirm, the case should be remanded for the lower courts to determine whether the exemption can be severed from the remaining provisions of the Act. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem.").

Whether a provision is severable is a question of state law, *Virginia v. Hicks*, 539 U.S. 113, 121 (2003); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and in Massachusetts the Legislature has declared a presumption in favor of severability: "The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not

affect other valid parts thereof." Mass. Gen. Laws ch. 4, § 6, Eleventh. This instruction inserts "a severability clause into every Massachusetts statute." *Mass. Wholesalers of Malt Beverages, Inc. v. Commonwealth*, 609 N.E.2d 67, 72 n.15 (Mass. 1993). As a result, when part of a statute is found to be unconstitutional, Massachusetts courts will "as far as possible, . . . hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." *Peterson v. Comm'r of Revenue*, 825 N.E.2d 1029, 1037 (Mass. 2005) (quotations omitted).

The employee exemption is not "so entwined" with the remaining provisions of the Act that it can be said that, without it, the Legislature would prefer that the Act have no effect at all. Again, the exemption, a carryover from the 2000 Act, does no more than allow employees to get on with their jobs; it is peripheral to the Act's central objective of improving public safety at facilities. *See* Mass. St. 2007, ch. 155. So even if the exemption is severed, the Act can still function effectively. Employees could still enter and exit the facilities under the first exemption (which petitioners do not challenge), and the remainder of the Act would continue on unaffected.

C. The Act is Narrowly Tailored to Address Massachusetts's Significant Interests in Protecting Public Safety and Patient Access

The Act's 35-foot fixed buffer zone was tailored to resolve the decades-long problem of keeping facility

entrances clear and safe. *Ward*, 491 U.S. at 796 (restriction must be "'narrowly tailored to serve a significant governmental interest'") (quoting *Clark*, 468 U.S. at 293). Regardless of whether Massachusetts was under any obligation to adopt a lengthy trial-and-error period, that is effectively what happened. Over the years, Massachusetts attempted multiple solutions. It tried injunctions. It tried a floating buffer zone. It tried other laws already on the books. Nothing worked. With its options virtually exhausted, the Legislature determined that the Act's fixed buffer zone—focused on the immediate area around facility doors and driveways—was the narrowest effective solution. *See* Pet. App. 109a. Given the extensive history in Massachusetts, the Legislature was entitled to make that decision. *See, e.g., Madsen*, 512 U.S. at 768-70 (on similar showing, decision to impose 36-foot buffer zone was entitled to deference); *Burson*, 504 U.S. at 200 ("evolution of election reform" demonstrated "necessity of restricted areas in or around polling places"); *Grace*, 461 U.S. at 182 ("total ban" on certain expressive activity may have been justified on showing that activity "obstructed the sidewalks or access to the [b]uilding").

1. The Act is Based on 20 Years of Experience Addressing Patient Access and Public Safety at Facilities

Petitioners' narrow-tailoring challenge ignores the record. Massachusetts has tried any number of solutions, including virtually all the alternatives suggested by petitioners. But they have all failed to keep facilities open and sidewalks safe. In light of this history, the Act's 35-foot fixed buffer zone—which, in

concrete terms, is less than the length of two parking spaces in busy urban areas such as Worcester and Washington, D.C.[24]—is "narrowly tailored to serve a significant governmental interest."[25]

In response to routine blockades that started in the late 1980s, facilities first sought injunctions. *See, e.g., Operation Rescue,* 550 N.E.2d at 1364 & n.5. But the injunctions did not solve the problem. Many of the enjoined individuals and organizations simply violated the orders. *See, e.g., Bell*, 677 N.E.2d at 207 (defendant "repeatedly and knowingly" violated multiple injunctions); J.A. 69 (police captain told Legislature, "We back up the stay-away orders and nothing seems to work down there."); *see also Madsen*, 512 U.S. at 770 (failure of initial order to "accomplish its purpose may be taken into consideration in evaluating the constitutionality" of broader order). Moreover, given the extent of the problem, which involved multiple municipalities and hundreds of protesters, individual injunctions were not an effective or efficient solution.

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[24] *See, e.g.*, City of Worcester Zoning Ordinance (Feb. 6, 2007), Article IV, § 7.A.5 & Table 4.4 (Note 3), available at http://www.worcesterma.gov/uploads/0e/4b/0e4beb7808380006ee7a7d4c7986fd0e/zoning-ord-2607.pdf (parking spaces must be 18 feet, or 16 feet for compact cars); D.C. Municipal Regulations (Mar. 22, 2002), Title 11, §§ 11-2115.1, 11-2115.3, available at http://dcoz.dc.gov/info/reg.shtm (spaces must be 19 feet, or 16 feet for compact cars).

[25] Again, petitioners do not contest the "general legitimacy" of the governmental interests served by the revised Act, public safety and access to healthcare. Pet. Br. at 35.

The 2000 Act, although a step in the right direction because of its general application, was no more effective. Its 18-foot floating buffer zone permitted too much activity near facility entrances. Individuals continued to block driveways and entrances, often by their mere physical presence in the buffer zone. J.A. 51-52, 123. Moreover, protesters would stop and stand in the middle of driveways, refusing to move. J.A. 41. They would speed up or slow down while walking across driveways to narrowly avoid being hit by cars. J.A. 41. They would take up stationary positions a few feet apart, forcing patients to "pass very close to them" on their way to the door. J.A. 96. And with the buffer zone permitting approaches within six feet, the activity was so frenetic right in front of facility doors that Captain Evans compared it to a "goalie's crease." J.A. 69. That kind of hectic activity right at facility doors—even as part of peaceful protest—continued to block facility doors and to intimidate patients.

In over 20 years of experience, the only solution that worked was the revised Act's 35-foot fixed buffer zone, which kept a limited area immediately around facility entrances and driveways clear, ensuring safe access while also accommodating all forms of speech and expressive conduct within the hearing, sight, and presence of approaching patients. Again, Massachusetts may not have been required to engage in a decades-long trial-and-error process before settling on the narrowest effective solution. *See Ward*, 491 U.S. at 797 (government does not have to "sift[]" through "all the available or imagined" alternatives to find the narrowest possible solution); *Clark*, 468 U.S. at 297 (camping regulation was "valuable, but perhaps imperfect" means of protecting park). But the fact is

that it did. And petitioners cannot ignore that history. *See generally Madsen*, 512 U.S. 753 (history of repeatedly blocked facilities demonstrated need to keep protesters out of 36-foot area and across street, especially where there were "few other options" and prior injunction had proven ineffective); *Burson*, 504 U.S. at 206 (history demonstrated "some restricted zone" was necessary); *United States v. Kokinda*, 497 U.S. 720, 735 (1990) (speech restriction justified by Postal Service's long experience with solicitation on its property) (plurality opinion).

2. Existing Laws Do Not Make the Act Unnecessary

Less-restrictive-alternative analysis "has never been a part of the inquiry into the validity of a time, place and manner regulation." *Ward*, 491 U.S. at 797; *see also Burson*, 504 U.S. at 213 (Kennedy, J., concurring) (in time, place, and manner cases, "we do not apply as strict a requirement of narrow tailoring as in other contexts"). Nonetheless, petitioners contend that other, existing laws are the solution to the decades of crowding and congestion outside facility entrances and make the Act unnecessary. Pet. Br. at 34-38. They are incorrect.

To begin with, government is not limited to a single solution to any problem. *See, e.g., O'Brien*, 391 U.S. at 380 ("it has never been suggested that there is anything improper" about "providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest"). And government is entitled to adopt different laws to protect "overlapping but not identical governmental interests." *Id.* Therefore, it is of no constitutional

import that both the federal government and Massachusetts have adopted other laws that could be used to address facility obstruction, through injunctions or otherwise. Pet. Br. at 36 (citing 18 U.S.C. § 248(c)(1), Mass. Gen. Laws ch. 266, § 120E,[26] and Mass. Gen. Laws ch. 12, § 11H). Moreover, although petitioners would seemingly prefer the "targeted" injunctions permitted by these laws, the experience in Massachusetts has shown that they do not work in this context: the conduct has been too widespread, involving too many protesters in too many municipalities, to make individual injunctions practicable.

Nor does it matter, given the record, that the Act itself also prohibits knowingly obstructing, detaining, hindering, impeding, or blocking facility entrances. Mass. Gen. Laws ch. 266, § 120E½(e); *see Schenck*, 519 U.S. at 381-82 (explicitly rejecting argument—because it "ignore[d] the record"—that prohibitions on "blocking, impeding or obstructing access" made buffer zone unnecessary). The 2000 Act contained the same language. Mass. St. 2000, ch. 217, §2(e). But again, experience proved that the solution was not the arrest and prosecution of individual protesters who engaged

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[26] Sections 120E and 120E½ of Massachusetts General Laws chapter 266 represent a sliding scale of legislative response to problems of different severity. Pet. Br. at 36 & n.10. Section 120E prohibits the knowing obstruction of medical facilities, but only after notice. Section 120E½, by contrast, includes no such notice requirement. Section 120E½, therefore, represents the Legislature's considered judgment, based on an extensive showing, that reproductive healthcare facilities need an extra layer of immediately available protection not required at hospitals generally.

in knowing obstruction. *See* J.A. 69 (Captain Evans testified, "We've tried everything, honestly," including individual prosecutions). Moreover, a significant portion of the problem was the simple massing of protesters within an 18-foot area right outside facility entrances. The mere physical presence of protesters—even without the specific intent to obstruct, hinder, or impede—blocked the entrances. Thus, the only effective solution was to keep a small area around facility entrances clear. *See Burson*, 504 U.S at 206, 220 (plurality rejected dissent's argument that regulating inside of polling places made 100-foot buffer zone unnecessary).

Petitioners also contend that Massachusetts's interests would be "amply served" by the federal law prohibiting facility obstruction by "using force" or "threat of force," and by Massachusetts laws prohibiting assault and battery and impersonation of a police officer. Pet. Br. at 36 & n.9. But these blunt enforcement tools "deal with only the most blatant and specific attempts" to block facility access. *Burson*, 504 U.S. at 206-07. And the problem at Massachusetts facilities included the massing of individuals in doors and driveways that impeded access, even if that was not the intent of individual protesters. *See, e.g.*, Dkt. No. 53 at 17 (NOW testimony that "counterprotests" were unhelpful because patients only saw crowd around door); *see also Schenck*, 519 U.S. at 382 (existing laws did not render buffer zone overinclusive). In any event, these laws, too, did not work. For example, police repeatedly arrested two protesters for impersonating Boston police officers. But as Captain Evans testified, it did not matter: "they're back there every day, every Saturday." J.A. 71.

The situation is likely to be different under the Act, assuming that arrests ever prove necessary. The difficulty in enforcing other laws in the protest context has always been proving intent. Did the defendant intend to "approach" a passer-by without the requisite consent under the 2000 Act? J.A. 67-68, 122-23. Did the defendant intend to physically block or obstruct the facility, or merely engage in lawful protest or counseling? J.A. 67-68, 122-23. It will be far less difficult to prove that a defendant intended to cross a marked yellow line to "enter" or "remain" in the buffer zone, making the Act a more effective enforcement tool and a better deterrent to conduct that has proven obstructive over the years.

3. The Act Permissibly Prohibits Even Peaceful Protesters from Blocking Facilities

Finally, petitioners appear to argue that a buffer zone can never be narrowly tailored unless it makes some provision for "peaceful protest." Pet. Br. at 38-44, 47. That is, the zone itself must permit activities such as leafleting and consensual conversation at intimate distances. Pet. Br. at 38-44. Of course, this argument ignores the fact that petitioners do leaflet outside Massachusetts facilities and do engage in close, quiet conversations with facility patients despite the Act's restrictions. *See infra* at 50 to 54; J.A. 306 (photograph of Ms. McCullen counseling young woman outside buffer zone).

But petitioners' argument also ignores both the law and Massachusetts's prior experience under the 2000 Act. Massachusetts is entitled to adopt time-place-manner restrictions based on the cumulative impact of

all conduct at facilities, not just the peaceful activities in which petitioners would like to engage. *Heffron*, 452 U.S. at 654 (inquiry must involve "not only ISKCON, but also all other organizations that would be entitled to distribute, sell or solicit"); *see also Ward*, 491 U.S. at 801 ("the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case"). And the record demonstrates that protesters—on both sides of the divisive abortion issue—have engaged in aggressive and harassing conduct that has left patients and staff intimidated and, in some cases, unwilling to enter facilities. *See, e.g.*, J.A. 21-22 (woman and her elderly grandfather engulfed by protesters, trapped in cab, and shoved on way into building); J.A. 88 (patients turn away from facilities "out of fear" on a weekly basis); J.A. 123 ("Pink Group" of pro-choice protesters pushed, shoved, and stepped on people's feet for good position within buffer zone).

Moreover, Massachusetts has already experimented with preserving peaceful protest right up to facility doors, and the experiment was a failure. The 2000 Act permitted a full array of peaceful protest within its 18-foot buffer zone. Advocates could leaflet, for example, particularly if they stood in one place and offered literature to those who approached. J.A. 44, 67, 122, 124. The 2000 Act also permitted advocates to engage passersby in conversation, so long as they had consent to approach closer than six feet. But even the peaceful protest permitted by the 2000 Act had the effect of blocking facilities. Protesters stood a short distance apart within the zone, so that patients "were forced to pass very close to them" to access the facility. J.A. 96.

They also took up positions right by facility entrances, so the doors and driveways were either actually blocked or perceived by patients to be blocked. J.A. 55, 67, 122; Dkt. No. 53 at 17. The sheer amount of activity within the 18-foot space was so overwhelming that patients were intimidated and left. J.A. 88-89. Thus, Massachusetts properly considered the cumulative effect of conduct by all protesters—the law-abiding and the law-breaking—and narrowly tailored its response to fit the actual problem outside its facilities. *See, e.g., Grayned*, 408 U.S. at 121 ("[m]odest restriction on some peaceful picketing" represented "a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place").

D. The Act Leaves Open Ample Alternative Channels of Communication

Finally, the revised Act also satisfies the third prong of the *Ward* test: it leaves open "ample alternative channels of communication." 491 U.S. at 791.[27] It is true that the Act keeps a limited area immediately around facility entrances and driveways clear of all but essential traffic during office hours. But outside that limited area, all forms of lawful

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[27] Petitioners suggest that adequacy of alternative communication should be judged by the means available *within* the area regulated by a time-place-manner restriction. Pet. Br. at 47. That is illogical. The *Ward* test requires the Court to look at "alternatives." Thus, the question is: what means of communication are available *despite* the time-place-manner restriction. *See, e.g., Madsen*, 512 U.S. at 769-70 (36-foot buffer zone upheld after consideration of communication available *outside* zone).

communication can—and do—take place within the sight, hearing, and presence of petitioner's preferred audience: facility patients. Petitioners offer leaflets, hold signs, pray, speak face-to-face with willing listeners, and approach others at a normal conversational distance. And petitioners can—and do—protest in their preferred location: the streets and sidewalks outside facilities. But because it has proved otherwise impossible to keep facility entrances open and safe, they just cannot do it right in facility doors and next to driveways. *See Heffron*, 452 U.S. at 647 ("First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"); *Adderly*, 385 U.S. at 47-48 (same); *Cox*, 379 U.S. at 554 (same). This is entirely permissible under the First Amendment. *See Burson*, 504 U.S. at 210 (state's choice that voters' "last 15 seconds" before entering polling place "should be their own, as free from interference as possible" was not "an unconstitutional choice"); *Schenck*, 519 U.S. at 375-76; *Madsen*, 512 U.S. at 768-70.

1. The Record Demonstrates That Petitioners Have Adequate Alternatives to Communicate Their Message

In *Burson*, this Court accepted the calculation of a lower court that it takes only 15 seconds to cross a distance of 75 feet. 504 U.S. at 210. That means it takes only about seven seconds to cross the Act's 35-foot buffer zone. So, except for those seven seconds immediately outside facility entrances, a patient on a public sidewalk is fully immersed in whatever expressive activity in which petitioners would like to

engage. And even that last seven seconds is not expression-free. Petitioners can still be seen and heard as a patient takes her last steps toward the facility door. Thus, petitioners have a more than ample opportunity to direct their message to their preferred audience at their preferred location. Pet. App. 23a ("[t]he record makes plain that communicative activities flourish" outside facilities).

The Act certainly does not prevent petitioners and other advocates from protesting at facilities. Each week, interested individuals gather outside the three facilities that are the subject of petitioners' suit. In Boston, for example, at least a dozen protesters, and sometimes many more, appear weekly outside a facility on Commonwealth Avenue. Pet. App. 6a; J.A. 129-30; *see also* J.A. 125, 271 (on second Saturday of each month, as many as 30 to 40 protesters gather outside the Boston facility, and on Good Friday there as many as 70). The situation is much the same at facilities in Worcester and Springfield. Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). Again, a regular group of protesters appears weekly, with their numbers swelling to as many as 100 on occasions such as the semi-annual "40 Days for Life." J.A. 228, 229-30, 237-40, 263-65 (Worcester); J.A. 204, 206-13 (Springfield); J.A. 301, 309, 310 (photographs).

At each of the three facilities, petitioners and others protest in the manner they see fit. In Boston, for example, advocates stand near the facility's front entrance—often ringing the buffer zone—holding signs, praying, singing, chanting, and speaking with or calling out to those who pass by and those who are entering the facility. Pet. App. 6a-7a (describing

scene); Pet. App. 41a-47a (same); J.A. 300, 303-05 (photographs). They also pass out leaflets and handbills close to the hands of those approaching or passing by the facility. Pet. App. 41a-42a, 43a, 46a. And they have close, quiet conversations with individuals on the surrounding sidewalks. Pet. App. 47a (investigator observed group of three sidewalk counselors engaging young woman, who got into a car with them and drove away); J.A. 126 ("[p]rotesters continue to have close contact with patients and others approaching the clinic"); J.A. 162-63 ("not unusual" for men accompanying women to the facility to confide in protester); J.A. 306 (photograph of close conversation between protesters and patient). Moreover, they can be seen and heard from within the buffer zone, and they are often heard even inside the facility itself. J.A. 113 (protesters can be heard from inside the building praying and calling out to patients). In fact, Boston protesters have acknowledged repeated success in conveying their message, with petitioner Eleanor McCullen convincing about 80 women not to terminate their pregnancies. Pet. App. 7a, 41a-42a, 47a.

The same is true at the Worcester and Springfield sites, although petitioners' desire to get as close as possible to patients as they enter the facilities is proscribed by geography: the primary entrances are reached by private parking lots and walkways. Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). Nonetheless, there are public sidewalks within sight and sound of the facilities, and petitioners are using them to disseminate their messages in a wide variety of ways. J.A. 114-15 (children brought to protest outside Worcester facility, and their singing could be heard inside). Petitioners

and others are able to display their signs, pass out literature, pray, sing, call out, and demonstrate, all within the sight and hearing of patients. Pet. App. 50a-57a, 59a-63a; J.A. 114-15, 117-18, 272-78. They even have close, quiet conversations with patients. J.A. 206-07, 208, 255-56, 259-61, 272-73 (among other things, describing a Worcester nun effective at drawing patients into quiet conversations).

And despite the physical layout of the facilities in Worcester and Springfield, petitioners' messages are still received by their target audience. Because petitioners can be seen and heard from their positions outside the buffer zone, patients, pedestrians, and passersby react and respond to them. J.A. 116. In both locations, petitioners and others have been successful in persuading women to stop, talk, and even leave the facility entirely. J.A. 208 (Springfield advocates persuaded women to leave facility and go to Bethlehem House, a pro-life organization); J.A. 258-59 (Worcester advocates persuaded women to go to Problem Pregnancy). For example, Worcester protester Mark Bashour recalled a woman seeking him out from across the private parking lot because she "genuinely wanted an alternative." J.A. 256-57. Mr. Bashour has been similarly approached by the boyfriends of patients, who cross that same parking lot for information that they presumably share with patients. J.A. 255. Springfield protester Dr. Cyril Shea recalled a man coming across that facility's private parking lot to engage with him on the sidewalk. J.A. 202-04. The man responded negatively to Dr. Shea's message, but nonetheless he responded. J.A. 204 ("The person was angry with me and wanted to express anger."); *see also* J.A. 202-03, 301 (Dr. Shea's "They're killing babies here" sign elicits

various reactions, some "quite favorable," some negative, some "totally neutral").

2. Petitioners Are Not Entitled to the Most Effective Speech Possible

Petitioners complain that the Act does not let them engage in the most effective speech possible, which they define as close, quiet conversations as close as possible to facility doors and driveways.[28] Pet. Br. at 49-52. Of course, this ignores the evidence that petitioners do, in fact, engage in close, quiet conversations with patients before they enter facilities. And it ignores the law, which does not guarantee protesters the form of expressive activity they deem most effective. *See Heffron*, 452 U.S. at 647; *Adderly*, 385 U.S. at 47-48; *Cox*, 379 U.S. at 554.

More fundamentally, it also ignores the reality of protesting on busy urban streets. It is not possible, for example, to safely approach a moving car. It is dangerous, for both protesters and passengers, to stand right at the edges of a busy driveway as cars turn into and out of a parking lot. In fact, certain time-honored forms of protest, such as leafleting, are just not compatible with modern vehicular traffic. While leafleting to pedestrians remains a vibrant form of protest, it is impossible to safely pass a pamphlet "close to the hands" of a driver, whose hands are—or at least

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[28] This definition contrasts with the position taken by the *McGuire* plaintiffs, including petitioner Jean Zarrella. In *McGuire*, plaintiffs maintained that they attempted to engage with facility patients "as far away from the clinic" as possible "in order to maximize the opportunity to engage in conversation." *McGuire II*, 386 F.3d at 51-52 (stating Zarrella's preference).

should be—firmly clamped to the steering wheel. *Compare* J.A. 141 (Ms. McCullen hands out 15 to 20 pamphlets to pedestrians every morning that she protests on Boston sidewalks), *with* J.A. 257 (Mr. Bashour hands out literature "a couple of times a week" in Worcester, which is reached primarily by car). And attempts to do so would likely recreate the hazardous situation that existed under the 2000 Act, in which protesters stuck their heads and hands into open car windows and threw literature inside, whether the driver wanted it or not. J.A. 51; Pet. App. 142a.

Finally, petitioners' argument ignores the inevitable effect of their preferred mode of communication. Each petitioner has stated that, given an unfettered choice, they would engage with patients *right in facility entrances*. *See* J.A. 252 (with no buffer zone in place, Mr. Bashour would stand "directly in front of the main door"); *see also* J.A. 135, 175, 189, 200, 217, 252. No matter how peaceful petitioners' protest and no matter how welcome their message, 20 years of experience demonstrates that they would block the entrances. Even if they just stood still at facility entrances to offer leaflets and conversation, they would impede patient access. And Massachusetts would be right back to where it started 20 years ago, with no solution to a substantial public-safety problem.

II. THE ACT IS NOT OVERBROAD

Petitioners' overbreadth challenge is based on a misreading of the Act. The Act does not "outlaw[] all communicative activity" on public sidewalks, such as "'talking and reading, or the wearing of campaign buttons or symbolic clothing.'" Pet. Br. at 45 (quoting *Board of Airport Comm'rs of L.A. v. Jews for Jesus,*

Inc., 482 U.S. 569, 575 (1987)). Unlike the law at issue in *Jews for Jesus*, the Act, on its face, does not prohibit expressive activity at all. It restricts only the physical conduct of "entering" or "remaining" in the buffer zone without a legitimate employment purpose or destination on the other side. So people who are properly crossing through the zone *can* engage in communicative activity as long as they keep moving. Conversely, people cannot stand stationary in the zone and refuse to move, even if they are not saying anything. Thus, far from creating "speech-free zones," Pet. Br. at 45, the Act regulates conduct without any reference to what people are saying (or are not saying).[29]

Properly construed, the Act is not susceptible to a facial challenge based on overbreadth. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The party claiming overbreadth therefore has the burden to "demonstrate from the text of [the law] and from actual fact, that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *N.Y. State Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,

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[29] Petitioners' contrary reading is inconsistent with the plain language of the Act, which makes no mention of speech or other expressive activity. Moreover, the Court of Appeals found that petitioners waived any overbreadth challenge based on that reading because they did not raise it either in the district court or in their briefs on appeal. Pet. App. 114a-115a.

449 n.6 (2008) ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.").

Petitioners have failed to meet that burden. They have not identified any instances where the Act's impact on the conduct of third parties will differ in any material way from the impact on their own activities. *See Taxpayers for Vincent*, 466 U.S. at 802 ("inappropriate" to entertain overbreadth challenge in absence of "realistic danger" that law would "significantly compromise recognized First Amendment protections of individuals not before the Court"). As applied to all people, the Act only reaches conduct that can create problems such as blocked sidewalks and traffic congestion. Petitioners concede that the Act is constitutional as applied to that type of conduct. Pet. Br. at 45. Thus, just as petitioners' activities fall within the Act's "legitimate sweep" for all the reasons stated above, so too do the activities of third parties not before the Court. *See Taxpayers for Vincent*, 466 U.S. at 801-03.

III. THIS CASE IS NOT A VEHICLE FOR REVISITING *HILL*

As is obvious from the above argument and from petitioners' own brief—which relegates the discussion to its last few pages—this case is not a vehicle for reconsidering *Hill*. In *Hill*, the State expressly restricted "protest," "education," and "counseling" in a 100-foot area surrounding the entrances of all medical facilities, creating "floating" buffer zones around patients. The Massachusetts Act is different and narrower. It restricts only the acts of "entering" or

"remaining," limits that restriction to a much smaller, fixed area, and applies only to places where there has been a demonstrated problem with access and safety. The Act is therefore much more akin to the fixed buffer zones upheld in *Madsen* and *Schenck*. In addition, the more unique aspects of *Hill* are not present here. For example, the Act does not restrict unwelcome "approaches," it does not shield the "unwilling listener," and it does not guarantee "floating" personal space on public streets and sidewalks. Thus, to the extent that petitioners wish to challenge *Hill*, they have picked the wrong case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

RECORD AND BRIEFS

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners' opening brief demonstrates that Massachusetts' 2007 Act is not a permissible regulation of the time, place, or manner of speech. It is not content-neutral, because it applies only outside abortion clinics. It is not even viewpoint-neutral, because it exempts clinic employees and agents. It is not narrowly tailored to prevent obstruction or violence, but indiscriminately criminalizes even peaceful, consensual, non-obstructive conversation and leafleting. And it does not preserve ample alternative channels for speech—particularly as applied to petitioners' calm, respectful, individualized offers of emotional and practical support, which cannot be effectively communicated by holding signs or using bullhorns from 35 or more feet away.

Massachusetts responds primarily by restating its uncontested interests in protecting public safety and preventing "the physical blocking of facility doors and driveways" (Br. 26), and then asserting that it "tried everything" but was unable to protect those interests in any less speech-restrictive way. *E.g.*, Resp. Br. 22. That assertion is neither facially plausible nor supported by the record. For example, despite regular police monitoring and video surveillance, respondents point to no evidence of even a single prosecution for nearly two decades under any of the myriad state and federal laws specifically prohibiting misconduct resulting in obstruction or interference with clinic access. Respondents protest that when areas become crowded, even peaceful speakers can block access. To the extent there is any evidence to support that concern, however, it is limited almost entirely to Saturday mornings at one clinic in Boston. Other evidence confirms that most facilities—including Boston—are usually uncrowded. Sporadic issues at one facility, which the State has *not* demonstrably sought to address with less-restrictive means, cannot justify banning speech (by non-clinic speakers) in 35-foot zones around every entrance to every abortion clinic all the time.

Recognizing that the Act at issue here goes too far scarcely leaves Massachusetts or other States powerless to protect their interests in safety and access. *Cf.* Resp. Br. 28. Indeed, government amici on both sides point to many alternative approaches that a decision for petitioners here would leave untouched. Petitioners maintain only that government measures affecting speech about abortion must be framed with the same neutrality and "precision of regulation" that is required in other contexts. *See, e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

I. THE RECORD DOES NOT SUPPORT RESPONDENTS' CLAIMS OF INTRACTABLE MISCONDUCT OR CROWDING PROBLEMS, EITHER GENERALLY OR AS APPLIED TO PETITIONERS

Respondents insist (Br. 41) that Massachusetts, facing a serious problem with obstruction and even violence at clinic entrances, "tried any number of solutions," and finally imposed broad exclusion zones only because every lesser measure "failed to keep facilities open and sidewalks safe." *See also, e.g.*, Br. 22-23. Indeed, they argue that areas near clinic entrances are routinely so "frenetic," "hectic," and "congested" that permitting even peaceful, consensual conversations or leafleting on public sidewalks within 35 feet of any clinic entrance or driveway would "inevitabl[y]" "impede patient access." Br. 21, 43, 47, 55. These claims cannot withstand scrutiny.

1. Respondents dedicate much of their brief to cataloguing an alleged history of misconduct around clinic entrances that was "widespread," "substantial," and involved "many protesters" in "many municipalities." Br. 45, 55. That alleged misconduct occurred at locations that are regularly monitored by police (JA 29-30, 67-68, 125, 188; *McCullen I* CAJA 86), clinic security (JA 105, 121), and video cameras (JA 68, 78, 105, 121). Respondents claim Massachusetts "tried everything" to address these problems, but "[n]othing worked" before the Act. Br. 41, 46. Yet, they cannot point to a single prosecution for obstruction, intimidation, harassment, violence, trespass, or violation of an

injunction outside an abortion clinic for at least seventeen years—long before the Act took effect.[1]

Respondents complain that laws directly targeting obstruction or violence (*see* Pet. Br. 36-38) are effectively unenforceable because of difficulties in determining intent or lack of consent. Resp. Br. 11, 47. It is, however, hardly novel or inappropriate to require the State to substantiate allegations of criminal misconduct with proof of guilty knowledge or intent. The United States has shown that it can effectively prove intent when enforcing its Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248.[2] And whatever problems of proof Massachusetts might encounter in marginal cases cannot explain its long-term failure to prosecute anyone at all for the sort of intractable misconduct it now suggests it faced.

Respondents' contention (Br. 45) that they could not use civil injunctions to address "widespread" mis-

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[1] The last injunction cited by respondents (Br. 42) dates to 1997. The record indicates the last "rescue"-style clinic blockade occurred in 1992. *McCullen I* CAJA 69.

[2] *See, e.g.*, DOJ, *National Task Force on Violence Against Health Care Providers: Overview, available at* http://www.justice.gov/crt/about/crm/faceweb.php (noting recent prosecutions and explaining that FACE "contains fairly straightforward offense language—requiring an intentional threat of force, use of force, obstruction or damage to property") (last visited Dec. 20, 2013); National Abortion Federation, *Abortion Facts: Freedom of Access to Clinic Entrances (FACE) Act, available at* http://www.prochoice.org/about_abortion/facts/face_act.html (reporting consensus that FACE "is an important tool in responding to clinic violence and in deterring possible offenders" and that "[b]etween the passage of FACE in 1994 and 2005, the [DOJ] has obtained the convictions of 71 individuals in 46 criminal prosecutions for violations of FACE") (last visited Dec. 20, 2013).

conduct involving "many protesters" is equally unpersuasive—especially in light of police testimony that officers "know all the regular players down there" and "know the regular protesters" (JA 69). Under those conditions, enjoining wrongdoers should be easy. Yet, respondents do not appear to have even tried to seek or enforce injunctions since the 1990s, when they prosecuted a few criminal contempt cases to enforce privately-obtained injunctions. *See, e.g.*, *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 550 N.E.2d 1361, 1364 n.5 (Mass. 1990) (upholding injunction against several groups and 69 individuals prohibiting, *inter alia*, "blocking, or in any way obstructing access").

Respondents cannot dismiss these laws targeting actual misconduct as too "blunt," or addressing only "blatant" violations. Br. 46. They prohibit, for example, making it "unreasonably difficult" to access clinics, 18 U.S.C. § 248(e)(4), or "hinder[ing]" or "imped[ing]" access, Mass. Gen. Laws ch. 266 § 120E½(e). They provide not only for criminal punishment, but for civil enforcement by federal or state prosecutors, clinics, or any person whose right to access has been "interfered with." *Id.* § 120E½(f). They are ample, varied, flexible tools—mostly awaiting respondents' first attempt to use them.

2. Respondents also argue (Br. 43, 46-49, 55) that they must impose complete exclusion zones around all abortion clinics because access and safety problems can arise from the cumulative effects of even peaceful, individually lawful and non-obstructive speech on public sidewalks. Even if such a situation is theoretically possible, it cannot justify the Act.

First, the Act is not tailored to address any issue of inadvertent obstruction. It applies at all abortion clinics at all times, obviously burdening substantially more speech than would be necessary to address any sporadic crowding issue. *Compare* N.Y. Br. 14-15 (collecting laws requiring crowds that have become obstructive to disperse when directed by police). Conversely, it does nothing to address such episodic sidewalk crowding anywhere other than in front of abortion clinics.

Second, virtually the only evidence of large crowds or hectic conditions that respondents can point to in an effort to support restricting peaceful, non-obstructive speech relates to one place and time: Saturday mornings in Boston. *See* Resp. Br. 6-12 (crowding evidence limited to Boston); JA 125 (police testimony that second Saturday of the month is the day of "largest protests" in Boston); JA 26-27, 49, 67-73, 95-96, 101, 122-124 (cited by respondents and only concerning Boston Saturdays).[3] Indeed, the record shows that police and clinics both treat that time and place as a special case. JA 88 (clinics tell patients allegedly deterred by speakers on Saturdays to come back during the week); *McCullen I* CAJA 86 (police presence doubled or tripled on second Saturday of each month); PPLM Br. 18 (facilities claim

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[3] The legislative record contains a letter from NARAL noting that six out of ten clinics surveyed described abortion speakers as a "problem." JA 54. The letter does not indicate whether the alleged problems involved crowds or misconduct (or simply the message being conveyed). Notably, four of the clinics reported no problem at all. Respondents also refer (Br. 17) to a single occasion in Worcester when a large number of Catholics said the rosary "[w]hen [the] bishop showed up" (JA 228-229) and one gathering at the Boston clinic on Good Friday (JA 185-186). They do not suggest that these groups interfered with anything, even accidentally.

to use escorts "only at the Boston Facility, and only on Saturday mornings").

There is no comparable record of crowds of any size at any other clinic in the State, or at the Boston clinic at any other time. *See, e.g.*, JA 275-277 (respondents' investigator observed no such crowds); *McCullen II* CAJA 516 (same).[4] On the contrary, petitioners are regularly alone or in small groups when they counsel and speak outside other clinics, or in Boston at other times.[5] McCullen's peaceful, consensual speech on an essentially empty Boston sidewalk on a Tuesday poses no threat to any state interest simply because there might have been a crowd there 72 hours earlier. Bashour's lonely counseling efforts in Worcester on a Saturday morning pose no such threat simply because there might be a crowd in Boston, 45 miles away. Yet, respondents ask this Court to accept as "narrowly tailored" a law that prohibits peaceful speech outside all Massachusetts abortion clinics, every day, during all business hours, based on an arguable "weekly scrum" (Resp. Br. 29) that arises, if at all, at one clinic, one time of the day, one day of the week.

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[4] Indeed, Boston is the only location described in the record that even has an entrance abutting a public sidewalk. JA 293, 295, 297. Worcester and Springfield are both set back on private property and thus essentially immune from the sidewalk-crowding problems alleged throughout respondents' brief.

[5] *See, e.g.*, JA 132 (McCullen: "My usual practice is to go to the [Boston] clinic on Tuesday and Wednesday mornings, from 7 a.m. to 11 a.m. Sometimes I sidewalk counsel by myself."); JA 247 (Bashour usually alone in Worcester after 10:00 am on any given day, and often alone on Saturdays); *McCullen II* CAJA 464 (Clark alone 90% of time).

Finally, respondents cannot cure the lack of tailoring by claiming that petitioners have said that without the Act they would stand and speak "*right in facility entrances.*" Resp. Br. 55 (emphasis in original). Even a cursory glance at respondents' record citations shows that that assertion is simply false. *E.g.*, JA 252 (Bashour: "If the buffer zone was not in place, ... I would stand on the Pleasant Street sidewalk directly in front of the main door.... *At that location, I would be about 50 feet from the main door.*" (emphasis added)); JA 200 (Shea: "I never stood in the parking lot or next to the entrance of the building. I never stood in the driveway, either."); JA 135 (McCullen: "close to the entrance").

II. The Act Is Not A Permissible Time, Place, And Manner Regulation

A. Neutrality

Respondents argue that the Act "regulates only conduct" (Br. 26); that it is facially neutral (Br. 30 & n.17, 38); and that it applies only at abortion clinics because that is where there were safety and access problems, not because of a state position on abortion (Br. 27, 29-35).

1. As respondents acknowledge, the Act was framed for the very purpose of moving speech about abortion off the public sidewalks outside the entrances and driveways of abortion clinics. *E.g.*, Resp. Br. 6-12, 48-49; *see also* N.Y. Br. 8 (Act allows use of sidewalks only for "reasons unrelated to expressive activities"). Restrictions on where speech may occur are restrictions on speech. *See, e.g., Hill* v. *Colorado*, 530 U.S. 703, 714-715 (2000); *United States* v. *Grace*, 461 U.S. 171, 176 (1983).

2. The Act singles out for regulation speech about one particular topic: abortion. Pet. Br. 23-27. While this is objectively true without any inquiry into legislative motivation, it is not an accident. Massachusetts sought to address what it saw as bad effects of "anti-abortion protests," but otherwise to "restrict as little speech as possible." Pet. App. 166a. A restriction of this kind, directed at and overwhelmingly affecting speech about one topic, cannot properly be subjected to reduced First Amendment scrutiny on the theory that it is "justified without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

Respondents seek support from cases upholding other "place"-related restrictions. Br. 30-31; *cf.* U.S. Br. 19-20. In *Burson* v. *Freeman*, 504 U.S. 191, 197-198 (1991) (plurality opinion), however, the plurality reasoned that a regulation targeting one type of speech was subject to strict scrutiny—which respondents do not claim the Act could pass. In *Hill*, the Court specifically relied on the fact that the law was drawn to apply outside all healthcare facilities, not just abortion clinics. 530 U.S. at 723-724, 731; Pet. Br. 23-24. None of respondents' cases considered restrictions applicable only to public-forum speech at specific locations where one particular often-protested activity occurs. *See, e.g.*, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643-645 & nn.4-5 (1981) (state fair attracting 1,400 exhibitors, including varied "charitable, religious, and other non-commercial organizations"); *Ward*, 491 U.S. at 784-786 (bandshell hosting diverse performances); *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (county courthouses).

Respondents argue that sidewalks near abortion clinic entrances could "conceivably" be used for speech

unrelated to abortion (Br. 30 n.17), and that the Act by its terms does not turn on "what [speakers] are saying" (Br. 38). Yet, despite repeated invocations of "20 years of experience" (Br. 21) and admonitions that "history matters" (U.S. Br. 18), respondents and their amici unsurprisingly point to no evidence, before the legislature or the courts, that speakers come to abortion clinics to discuss topics other than abortion.

Speech restrictions that are targeted in this way violate the central principle underlying the test of "content neutrality." Truly neutral time, place, and manner restrictions may safely be subjected to lesser judicial scrutiny "in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring and dissenting in part); *see also* Pet. Br. 22-23; *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Hill*, 530 U.S. at 731; Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. 413, 495-496 (1996) ("The breadth of [generally applicable] laws makes them poor vehicles for censorial design; they are instruments too blunt for effecting, or even reflecting, ideological disapproval.").

In sharp contrast, "[l]aws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." *Turner*, 512 U.S. at 676 (opinion of O'Connor, J.); *see also Hill*, 530 U.S. at 767 (Kennedy, J., dissenting) ("Clever content-based restrictions are no less offensive than censoring on the basis of content."). Thus, even "a facially general law that operates [in practice] to restrict only

speech of a particular kind ought to confront the strictest review." Kagan, 63 U. Chi. L. Rev. at 517 n.238. A law that applies only outside abortion clinics lacks the generality upon which the time, place, and manner doctrine rests.

Respondents argue (Br. 27) that a speech regulation is "content neutral" so long as it serves a purpose unrelated to disagreement with particular speech. That overstates the point. Many content-based laws also serve some non-censorial purpose. *See, e.g., Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972). A law banning all antiwar rallies would serve interests in crowd control and avoiding litter. The question is whether a law's service of those ends is truly independent of the content and viewpoint of the affected speech. *See, e.g., United States* v. *Eichman*, 496 U.S. 310, 315-318 (1990) (facially neutral prohibition on flag destruction was content-based because asserted state interest was only threatened by burnings with particular message); *see also Hill*, 530 U.S. at 746-747 (Scalia, J., dissenting). Here, the Act is based on legislative conclusions or assumptions about the likely behavior of *speakers about abortion*. *See, e.g.*, Resp. Br. 10-12 (citing evidence about conduct of speakers on both sides of abortion issue). Such a law may be *viewpoint*-neutral (although this one is not), but it is not *content*-neutral.[6]

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[6] Moreover, the content-based assumption underlying the State's use of purported crowding problems at one location to justify a statewide Act—that speech about abortion would be obstructive and dangerous at any clinic location—is something this Court has disapproved before. "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Mosley*, 408 U.S. at 100-101; *see also Boos* v. *Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., con-

Finally, respondents complain that Massachusetts should not be required to address "'problems that do not exist'" or to be "overinclusive to be content neutral." Br. 30, 31. In the passage the State quotes, however, the *Burson* plurality explained that if a State decides to address what it perceives as an isolated problem by "distinguishing among types of speech," then its approach will be "subjected to strict scrutiny." 504 U.S. at 207. Likewise, when the State addresses a perceived issue in a way that burdens speech, it is not "overinclusive" to treat all speakers and all topics the same way. If the State wants its law to receive less-than-strict scrutiny, the question is not whether "the coverage of a statute is broader than the specific concern that led to its enactment," but whether the legislature has truly made a "general policy choice." *Hill*, 530 U.S. at 730-731. A law that created no-standing zones around the entrances to any building might pass that test. An Act that applies only outside abortion clinics does not.

3. The Act is also not viewpoint-neutral, because of its employee exemption. Pet. Br. 27-32. Respondents struggle to portray the exemption entirely in terms of "conduct" (Br. 35-39), but they nowhere refute petitioners' simple point (Pet. Br. 33-34) that any clinic agent prosecuted for speaking in the buffer zone within the scope of his or her employment (so, the speech would have to express a clinic viewpoint) would have a categorical statutory defense. Moreover, even if there

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curring) ("Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech [citing *Mosley*], requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects.").

were some basis for respondents' suggested "conduct-oriented" limitations (Resp. Br. 38), that would not cure the problem. The State may not allow clinic agents to use a public forum to "help patients access [an abortion] facility" (*id.*) while forbidding petitioners from using the same area to offer alternative help. "[D]istinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction." *Hoye* v. *City of Oakland*, 653 F.3d 835, 851 (9th Cir. 2011).[7]

B. Narrow Tailoring And Overbreadth

1. In defending the Act in this Court, respondents conspicuously ignore or seek to distinguish *Hill*—despite the court of appeals' heavy reliance on that decision in upholding the Act. *See* Pet. Br. 5-6, 18-19. In particular, respondents make no effort to address *Hill*'s extensive discussion of how a statute may be narrowly tailored to serve interests in access and safety. *Hill*, 530 U.S. at 726-730. The omission is telling because, as petitioners have explained, *Hill* sustained Colorado's law only because it carefully protected (1) speech with willing listeners, (2) leafleting, and (3) communicating from a "normal conversational distance." *Id.* at 712. The Act lacks all of those safeguards. Pet. Br. 39-44.

Respondents try to suggest (Br. 57-58) that the Act is "narrower" (and thus less problematic) than the law in *Hill*, restricting "only" entering or remaining to

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[7] Respondents cannot salvage the Act by inviting severance of the employee exemption. Br. 39-40. They offer no authority for the proposition that courts could properly strike an exemption from a criminal statute, authorizing punishment for conduct the legislature expressly exempted from criminal sanctions.

speak, rather than restricting unwelcome approaches or seeking to shield unwilling listeners. That is backwards. Restricting *more* speech, including *consensual* speech, is not a virtue. *See Hill*, 530 U.S. at 726-730; *id.* at 738 (Souter, J., concurring) ("The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching.").

The logic of respondents' position—that prohibiting all speech ought to be treated as *more* tailored than prohibiting only a subset of unwanted approaches—would invite future legislative efforts to curtail peaceful speech on public sidewalks, potentially on a diverse array of topics of public concern. *See, e.g.*, AFL-CIO Br. 1, 5-6 (labor relations). As the ACLU put the point before its views "evolved" in this Court (ACLU Br. 11 n.5), the Act "is not a restriction which is 'narrowly tailored' in any meaningful sense and, as a result, could provide a legal justification for future restrictions on the speech and assembly rights of groups such as trade unions, anti-war and environmental activists, and others." JA 66.

Nor is the Act narrowly tailored to the State's asserted interest in protecting public safety or minimizing congestion merely because, as respondents imply, it has eliminated crowds where prior measures did not. *See, e.g.*, Resp. Br. 22, 41, 43, 47. As discussed above (at 6-7), the historical premise of that claim is at best overstated. But even if there were a record of persistent, obstructive crowding at all clinics, a statute is only narrowly tailored "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). Respondents repeatedly identify that evil as undue crowding in the

area "immediately adjacent" to clinic entrances. Br. i, 1, 3, 11, 12, 14, 15, 21, 30, 35, 43, 45, 49, 50. A 35-foot no-speech zone is manifestly not narrowly tailored to address that concern.

Moreover, rather than proscribing obstructive or unsafe conduct, the Act proceeds (and the State defends it) on the premise that it is better to ban "all [speakers]—the law-abiding and the law-breaking." Resp. Br. 49. That conscious forsaking of any effort to distinguish between peaceful speech that many potential listeners would welcome (*see* JA 132-133, 269-271, 284-286) and misconduct that could be "an appropriately targeted evil" (*Frisby*, 487 U.S. at 485-486) is the antithesis of narrow tailoring. A law that criminalizes even a quiet offer of information to a consenting adult on a public sidewalk—at any abortion clinic, every day, regardless of circumstances—is not narrowly tailored.

2. For the same reasons that it is not narrowly tailored, the Act is also impermissibly overbroad. Restricting all speech at every abortion clinic is precisely the sort of approach this Court has historically condemned on that basis. *See, e.g.*, *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940) (invalidating anti-picketing law which "does not aim specifically at serious encroachments").

Respondents argue that petitioners' overbreadth challenge rests on a "misreading of the Act," which "does not prohibit expressive activity at all." Br. 55, 56. "[P]eople who are properly crossing through the zone," the State now maintains, "*can* engage in communicative activity as long as they keep moving." Br 56 (emphasis in original).

The premise that there is no prohibition of expression is hard to take seriously. Indeed, even respond-

ents cannot keep the point straight. In trying to recast the statute, and the Attorney General's contemporaneous "guidance" letter, as about "conduct," they argue that the letter "used the ... phrase—'partisan speech'—to convey ... a limitation on facility employee conduct," and that its references to "counter-protests, counter-education, or counter-counseling" were likewise about "conduct," not speech. Resp. Br. 15 n.10. But when they turn to arguing that "this case is not *Hill v. Colorado*," they cite Colorado's use of the same terms—"*i.e.*, 'protest,' 'education,' and 'counseling'"—in arguing that the law at issue there "expressly restricted speech." Br. 23. Respondents cannot have it both ways.

In any event, petitioners' "misreading" of the Act was also *the State's* reading until its most recent brief, proffered by the Attorney General in formal guidance to law enforcement and defended by respondents in the courts below. *See, e.g.*, JA 93-94; Pet. App. 173a; Pet. Br. 33 n.8. That may be why it is also advanced by respondents' amicus, the United States. U.S. Br. 20 (the Act "does not permit political discussion or expression of personal views inside a buffer zone by anyone"). Regardless, under either interpretation, as to the vast majority of speakers not covered by an exemption, the Act clearly "create[s] a virtual 'First Amendment Free Zone'" on public sidewalks near abortion clinics. *Board of Airport Comm'rs of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). As this Court has made clear, even in a *non*-public forum, "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

C. Ample Alternative Channels

Finally, respondents' approach to the "ample alternative channels" inquiry under *Ward* (Br. 49-55) would

effectively replace "ample" with "any." Indeed, in the State's view the remaining channels are "more than ample" simply because "[p]etitioners can still be seen and heard" from inside the exclusion zone, and the Act "certainly does not prevent petitioners and other advocates from protesting." Br. 51.

Whether the Act leaves excluded persons any opportunity to speak somewhere near the clinics is not the relevant question. *See Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). The State must show that remaining channels provide a "practical substitute" for the extinguished one, and permit speakers to reach their audience "nearly as well." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 57 (1994). Shouting and holding large signs readable from 35 feet or more away are not adequate alternatives for face-to-face conversations at normal distance, or for offering handbills or leaflets near the hands of passers-by. Pet. Br. 11-16.

The inadequacy of the channels left open by the Act is confirmed by the evidence of petitioners' experiences, especially in Worcester and Springfield. Pet. Br. 49-52. Respondents point to occasional instances in which petitioners were able to communicate with willing listeners at these locations (Resp. Br. 52-53), but the record demonstrates that such occasions have become rare under the Act. Pet. Br. 15-16; JA 200, 217-218, 224, 250, 255-256.

Respondents attempt to dismiss these difficulties as a product of facility layouts and the fact that most visitors enter the Worcester and Springfield facilities by car. Br. 52-54. But it is the Act that prevents peti-

tioners and other speakers from stationary speech on public sidewalks within 35 feet of clinic driveways—making leafleting, for example, virtually impossible. The State's response—that "certain time-honored forms of protest, such as leafleting, are just not compatible with modern vehicular traffic" (Br. 54)—is startlingly broad. And it does not explain why, in that case, respondents have chosen to ban such allegedly anachronistic and dangerous speech near the driveways to abortion clinics, but nowhere else.

III. Having Abandoned *Hill*, Respondents Have Found No Better Support Elsewhere

Unable or unwilling to address *Hill*—the only public forum case in which this Court has used the *Ward* test to uphold a law even remotely like the Act—respondents and their amici seek to rely instead on an assortment of cases that are easily distinguishable and, to the extent they are relevant, serve mostly to demonstrate the "precision of regulation" that is absent in the Act.

1. Respondents' reliance on *Madsen* and *Schenck* is misplaced. Both involved injunctions—precisely the type of misconduct-based, individually-tailored remedy that respondents claim to be impossible here. In each, this Court relied on a proven history of misconduct by the enjoined parties. *See, e.g.*, *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 381-382 (1997). "An injunction, by its very nature, applies only to a particular group (or individuals)" and does so "because of the group's past actions in the context of a specific dispute between real parties." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (contrasting injunction with "a statute addressed to the general public"). On an appropriate record, a court may enjoin particular

past law-breakers from continuing to obstruct access to particular places; but it cannot be assumed that every valid order against prior law-breakers can be extended by statute to law-abiding citizens. The State may not restrict speech based on assumptions about whole categories of speakers, or extrapolations from the proven misconduct of a few to the expected conduct of all. *Mosley*, 408 U.S. at 101.

Respondents and their amici also rely on cases involving speech regulations *outside* public forums. *See, e.g., United States* v. *Kokinda*, 497 U.S. 720, 727-730 (1990) (plurality opinion) (sidewalk on postal service property); *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 680 (1992) (airport terminals); *Heffron*, 452 U.S. at 655 (state fairgrounds, "a limited public forum"). Under this Court's precedents, governments justifiably have more leeway to regulate expressive conduct outside the traditional public forum. *See, e.g., Kokinda*, 497 U.S. at 730 (regulation in non-public forum need only be "reasonable" and not viewpoint-based). Notably, however, even the regulations at issue in respondents' non-public-forum cases demonstrate far more tailoring, and allowed for far more speech, than does the Act. *See, e.g., id.* (solicitation of in-person gifts banned, but speakers were "permitted to leaflet, speak, and picket"); *Heffron*, 452 U.S. at 655 (transitory leafleting during state fair prohibited, but speakers could "mingle with the crowd and orally propagate their views").

Finally, respondents seek support in cases upholding laws that prohibit only actual misconduct, without broadly prohibiting peaceful, consensual speech or leafleting. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 330 (1988) (dispersal law applied only when "police reasonably believe that a threat to the security or peace of the em-

bassy is present," not to peaceful demonstrations); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (prohibiting "making of any noise or diversion which disturbs ... the peace or good order of such school"); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968) (prohibiting "'picketing ... in such a manner as to obstruct or unreasonably interfere with free ingress or egress'"); *Adderley* v. *Florida*, 385 U.S. 39, 40 (1966) (trespass statute); *Cox*, 379 U.S. at 560 (prohibiting picketing with intent to interfere with or obstruct court administration). Such laws are narrowly tailored precisely because they target no more than a perceived evil that the government permissibly seeks to redress. *See, e.g.*, *Boos*, 485 U.S. at 331-332 (focus on violent demonstrations "prevent[s] the congregation clause from reaching a substantial amount of constitutionally protected conduct and make[s] the clause consistent with the First Amendment"); *Grayned*, 408 U.S. at 119 ("Far from having an impermissibly broad prophylactic ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities." (footnote omitted)). The same cannot be said of the Act.

Respondents can point to just one case from this Court sustaining a statutory restriction on public forum speech: the plurality decision in *Burson* v. *Freeman*. Notably, the electioneering restriction in *Burson* applied equally to all polling places (not, for example, just those with particular issues on the ballot), and to all speakers. *See* 504 U.S. at 193-194. Nevertheless, the plurality upheld the statute only after subjecting it to strict scrutiny. *Id.* at 197-198, 207. It concluded that a prophylactic no-electioneering zone was "[t]he only way to preserve the secrecy of the ballot"; every state had adopted the same approach; and law enforcement officers were "barred from the vicinity of the polls," making

it likely that misconduct prohibited by other laws "would go undetected." *Id.* at 207-208.

Burson cannot support the Act. First, respondents have staked their case on surviving the limited scrutiny accorded to content-neutral time, place, and manner restrictions; they make no claim that the Act could pass strict scrutiny. *See* Pet. Br. 52-53 (unrebutted argument that the Act fails strict scrutiny). Second, here, unlike in *Burson*, there is no long or widespread history of similar laws in other States, and no inability to use monitoring by police, clinic security, and video cameras to identify and remedy violations of less speech-restrictive laws. *See supra* pp. 3-5. And third, *Burson*'s fifth vote was provided by Justice Scalia, on the different theory that the relevant sidewalks were *not* a public forum. 504 U.S. at 215 (Scalia, J., concurring in the judgment).

2. Several of respondents' amici write in support of alternative laws that not only would not be endangered by a decision striking down the Act, but help to illustrate the Act's lack of tailoring. For example, the United States cites the federal Freedom of Access to Clinic Entrances Act. U.S. Br. 1-2. That law, widely lauded for its effectiveness in enhancing order and safety at clinics, prohibits only problematic conduct, such as obstruction and intimidation. *See* 18 U.S.C. § 248. Similarly, the federal military funeral protest law (U.S. Br. 19) focuses on "disruption," "disturbing the peace," or "impeding access." *See* 18 U.S.C. § 1388; *see also* Michigan Br. 6-8 (distinguishing funeral buffer-zone laws).

Amicus New York writes in support of a state law that prohibits only threats of violence, use of force, or knowing obstruction of pedestrian access. N.Y. Br. 15. It usefully describes the experience of New York City,

which, when it decided that it needed more stringent protections, additionally prohibited "following and harassing" an unwilling listener within a 15-foot buffer zone—without restricting peaceful, consensual speech. N.Y. Br. 16. These laws illustrate some of the many ways to address problematic conduct with the "precision of regulation" the Constitution requires. Set against these far narrower and more carefully tailored alternatives, Massachusetts' fixed, 35-foot exclusion zone outside of all clinic entrances becomes even more difficult to defend.

* * *

Massachusetts' 2007 Act contains none of the careful safeguards this Court relied on in *Hill*. Indeed, the State has now disclaimed (Br. 58) any interest in protecting unwilling listeners from unwanted speech or "approaches" on the public sidewalks and driveways near abortion clinics. If this Court reviews the Act in light of *Hill*, the Act must surely be struck down.

As petitioners have suggested, however, the Court might also wish to take this opportunity to revisit *Hill*. *See* Pet. Br. 53-56. Notwithstanding respondents' protestations to the contrary (Br. 57-58), it was *Hill* that led the court of appeals to uphold the Act. *See, e.g.*, Pet. Br. 5-6, 16-17. As petitioners have explained (Br. 53), if any plausible reading of *Hill* might suggest that result, the decision should be substantially clarified, narrowed, or overruled. Moreover, *Hill* has also led to a number of other legislative efforts and judicial decisions in deep tension with the First Amendment's normally robust protection of peaceful speech in the public forum. Pet. Br. 55-56. Given the confusion and error it has caused in this and other cases, the decision may be ripe for reconsideration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a Massachusetts statute that creates buffer zones extending 35 feet from the entrances and driveways of reproductive health-care facilities violates the First Amendment, either on its face or as applied at several specific facilities.

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INTEREST OF THE UNITED STATES

The Attorney General of the United States has primary responsibility for enforcing the Freedom of Access to Clinic Entrances Act of 1994 (Act), 18 U.S.C. 248. The Act prohibits, *inter alia*, the use or threat of force, or physical obstruction, to injure, intimidate, or interfere with any person because that person is, or has been, obtaining or providing reproductive health services, or to intimidate any person from doing so in the future. 18 U.S.C. 248(a)(1). Injunctive relief in civil actions brought by the Attorney General pursuant to the Act, see 18 U.S.C. 248(c)(2)(B), can include restrictions on entering or remaining in an area within a specified distance from a health-care facility. Because the principles that the

Court articulates here could affect the scope of injunctive relief available under the Act, the United States has a significant interest in the resolution of this case.

STATEMENT

1. By the "late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior" near reproductive health-care facilities. *McGuire* v. *Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) (*McGuire I*). Those incidents included shootings at two different facilities in December 1994; the shooter killed two Planned Parenthood receptionists and wounded five other people. See *In re Opinion of the Justices to the Senate*, 723 N.E.2d 1, 5 & n.4 (Mass. 2000); J.A. 14; *id.* at 57-59 (letter to legislators from victim's brother).

Massachusetts courts issued injunctions against various actors in an attempt to ensure public safety and continued access to the health-care services that such facilities offer. For instance, in *Planned Parenthood League* v. *Bell*, 677 N.E.2d 204 (Mass.), cert. denied, 522 U.S. 819 (1997), the Supreme Judicial Court upheld an injunction against a woman who (in violation of prior injunctions to which she was subject) physically blocked and screamed at patients in the street and posed as a facility escort. *Id.* at 206-208, 209-212; see, *e.g.*, *Planned Parenthood League* v. *Blake*, 631 N.E.2d 985 (Mass.), cert. denied, 513 U.S. 868 (1994); *Planned Parenthood League* v. *Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); see also *Commonwealth* v. *Cotter*, 612 N.E.2d 1145 (Mass. 1993) (upholding conviction for violating injunction).

Those injunctions were not adequate to address the problem, however. At hearings before the state legislature in 1999, witnesses "described how advocates of

both sides of one of the nation's most divisive issues" continued to "frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." *Opinion of the Justices*, 723 N.E.2d at 5; see *McGuire I*, 260 F.3d at 39; J.A. 12-24 (testimony about incidents in which driveways and entrances were blocked, family members of patients were jostled and shoved, patients and facility employees were videotaped, and patients' children were "scream[ed] at" and "badger[ed]"); see also J.A. 26-27 (deposition testimony that pro-choice demonstrators "yell[ed] * * * vulgarities").

2. Having "thoroughly" investigated these concerns, *McGuire I*, 260 F.3d at 44, Massachusetts concluded that "existing laws did not adequately safeguard clinic staff, prospective patients, or members of the public." Pet. App. 95a. In 2000, the Commonwealth enacted a statute modeled on the Colorado law that this Court upheld in *Hill* v. *Colorado*, 530 U.S. 703 (2000).

The 2000 Massachusetts statute created zones extending 18 feet from the entrances and driveways of reproductive health-care facilities, and it banned anyone in those zones during business hours from knowingly "approach[ing]" within six feet of another person without consent for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Mass. Ann. Laws ch. 266, § 120E½(b) (LexisNexis 2002); see *id.* § 120E½(e) (prohibiting "knowing[]" obstruction of facility entrances). The statute exempted persons with specific business at the facility, including facility employees and agents "acting within the scope of their

employment," *id.* § 120E½(b); the Massachusetts Attorney General issued guidance clarifying the limited scope of that exception and provided training to facilities and law enforcement agencies consistent with that guidance. *McGuire* v. *Reilly*, 386 F.3d 45, 52 (1st Cir. 2004) (*McGuire II*) (noting guidance statement prohibiting "counter-protests, counter-education, or counter-counseling" within the zones), cert. denied, 544 U.S. 974 (2005).

The First Circuit upheld the 2000 statute both on its face and as applied. As to the facial challenge, the court of appeals ruled that the statute "lawfully regulate[d] the time, place, and manner of speech without discriminating based on content or viewpoint." *McGuire I*, 260 F.3d at 39; see *id.* at 46, 48-49. As to the as-applied challenge, the court concluded that employees and agents were not permitted to engage in protest, education, or counseling in the 18-foot zones and that authorities had enforced the statute's restrictions evenhandedly. See *McGuire II*, 386 F.3d at 64-65.

3. Over time, the Massachusetts legislature became convinced that the 2000 statute was not adequately protecting public safety and ensuring access to health care for women seeking not only abortion-related counseling and services, but a wide array of other health services. See J.A. 61 (stating that "[m]ore than two-thirds" of visits at particular facility "were for non-abortion related services"); *id.* at 14, 18.

Even when the law was obeyed, threats to safety and access problems persisted. Facility entrances were choked with people, all standing as close to the door as possible in the hopes that each patient would have to approach them to get inside. See, *e.g.*, J.A. 62,

67, 77-78, 122-124; Pet. App. 138a; see also J.A. 86. And protesters continued to confront each other at very "close quarters." J.A. 69; see *id.* at 80, 86, 95; see also *id.* at 123 (describing "frequent disturbances, including physical jostling," outside Boston facility "involv[ing] pro-choice protestors, pro-life protestors, patients, and patient companions"). Pro-choice protestors could be "particularly disruptive," since they sometimes would "push, shove, and step on other people's feet in order to get a good position" inside the 18-foot zones. *Ibid.*; see *ibid.* (explaining difficulties with "combined presence of * * * protestors").

In addition, the 2000 law was violated "routinely." Pet. App. 145a; see, *e.g.*, J.A. 60. Members of the gathered crowds thrust their heads and hands into open car windows and deposited literature inside the cars, see JA. 36, 51, 61, 79; Pet. App. 142a; surrounded patients and employees while "shout[ing] at" and "taunt[ing]" them, J.A. 50, 61, 96; videotaped patients and facility employees at close range, see *id.* at 51, 61, 124; and dressed in shirts and hats reading "Boston Police" while asserting that patients entering driveways were required to provide their names and other personal details, see *id.* at 36-37, 89, 99, 124; see also *id.* at 51, 62, 69-71, 79-80.

Enforcement of the law was difficult. In chaotic crowds, outnumbered police officers could not readily discern who was approaching whom and whether the approaching party was within six feet of a moving target; as one officer testified, the law turned him into "a basketball referee down there, where we're watching feet, we're watching hands." Pet. App. 146a; see *id.* at 145a. Officers often were not well positioned to evaluate claims that those approached had consented

or that the approacher had ventured close to another person for proper purposes. See Pet. App. 145a; J.A. 50-51. Accordingly, few violators were arrested, and even fewer were successfully prosecuted. See J.A. 68-70; Pet. App. 147a.

4. In 2007, the Massachusetts legislature heard extensive testimony on the persistence of a disorderly and threatening climate at facility entrances—as well as testimony on the First Amendment implications of any change in the law. See J.A. 31-89; Pet. App. 149a-150a. The legislature concluded that there remained a "significant public safety and patient access problem," Pet. App. 165a, and it amended the 2000 law to address that continuing concern. See *id.* at 150a-151a; 2007 Mass. Legis. Serv. ch. 155.

The 2007 legislation, the constitutionality of which is at issue here, eliminated the prior law's floating 6-foot "bubble" within an 18-foot zone and replaced it with a 35-foot fixed buffer zone that requires no inquiry into whether a speaker is engaging in protest, education, or counseling. The 2007 statute provides that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway * * * in straight lines to the point where such lines intersect the sideline of the street." Mass. Gen. Laws ch. 266, § 120E½(b); *id.* § 120E½(d) (making first-time violators subject to "a fine of not more than $500 or not more than three months in a jail or house of correction"). The buffer zone is enforceable only during

business hours and only if it is "clearly marked and posted." *Id.* § 120E½(c). The legislature left in place other portions of the 2000 statute, including exemptions covering "(1) persons entering or leaving such facility; (2) employees or agents of such facility acting within the scope of their employment; (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." *Id.* § 120E½(b).

Shortly after enactment of the 2007 amendment, the Massachusetts Attorney General issued further guidance regarding the exemptions. The guidance states that the first exemption, for persons entering or leaving, "allows people to cross through the buffer zone on their way to or from the clinic" but does not permit them "to stand or remain in the buffer zone." J.A. 93. The second exemption, the guidance explains, "allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone." *Ibid.* The third exemption, which covers municipal employees performing official duties, is similarly limited. See *ibid.* Finally, as to the fourth exemption, the guidance provides that a protester may walk through the buffer zone to the other side—for instance, to "reach and speak with someone outside the zone"—if "the individual does not do anything else within the buffer zone." *Id.* at 93-94.

Enforcement of the 35-foot buffer zone has resulted in a "much more orderly" atmosphere and "fewer confrontations." J.A. 126; see *id.* at 97. Meanwhile, the public continues to have ample opportunity to express its views near Massachusetts reproductive health-care facilities. See, *e.g.*, *id.* at 97-98, 126-127. The number of protesters has not decreased. See, *e.g.*, *id.* at 125. And patients entering the facilities can still see and hear the people who are engaging in different forms of expression, who are free to approach patients outside the zone for quiet conversation or to call out to them as they traverse the zone (or cross private property) with expressions of compassion and offers of assistance. See, *e.g.*, *id.* at 148, 171-172, 206, 274-275, 278, 288, 291-292, 304, 306.

5. Petitioners—individuals who regularly stand near facilities in Boston, Springfield, and Worcester to protest abortion and to speak with patients—challenged the new law, on its face and as applied.

a. The district court denied the facial challenge. Pet. App. 121a-210a. The court of appeals affirmed, holding that the law is a permissible time, place, or manner regulation. *Id.* at 93a-120a.

First, the court of appeals found the law neutral as to content and viewpoint. It reasoned that the law merely regulated "the places in which speech might occur" and was "justified" by "legitimate safety and law enforcement concerns" without "reference to the content of any speech." Pet. App. 102a; see *id.* at 103a-105a. In light of extensive "legislative factfinding," the court concluded that such concerns were not a pretext for animus against anti-abortion speech. *Id.* at 104a. And the court rejected the argument that exempting facility employees and agents impermissi-

bly favored one viewpoint. *Id.* at 105a-106a (citing *McGuire I*, 260 F.3d at 45-47).

Second, the court of appeals found that the law "facilitates a substantial governmental interest that would be less effectively served without" it. Pet. App. 107a. The court pointed to "the ineffectiveness of the preexisting law" and the legislature's determination, "after considerable study," that additional protection was needed. *Id.* at 109a.

Finally, the court of appeals ruled that the 2007 law leaves open ample alternative channels of communication. The court observed that the law "places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone," including "offer[ing] either literature or spoken advice to pedestrians," and that those activities "may be seen and heard by individuals entering, departing, or within the buffer zone." Pet. App. 110a-111a. Moreover, the court added, "[a]ny willing listener is at liberty to leave the zone, approach those outside it, and request more information." *Id.* at 111a; see *ibid.* ("the size of the zone is not unreasonable").

b. The district court subsequently rejected petitioners' as-applied challenge. Pet. App. 29a-91a. The court of appeals again affirmed. *Id.* at 1a-28a.

The court of appeals rejected petitioners' claim that application of the employee-related exemption constitutes "viewpoint discrimination." Pet. App. 14a-18a. Even assuming that employees in a buffer zone sometimes express views and interfere with protesters' speech, the court held, such behavior by private actors cannot be attributed to the Commonwealth, because the exemption "does not purport to allow either advocacy by an exempt person or interference

by an exempt person with the advocacy of others." *Id.* at 15a. In addition, the court detected "no allegation that such behavior has been sanctioned by the state" or that plaintiffs ever complained about it to any "state authorities." *Id.* at 17a.

The court of appeals also found that the law preserved ample alternative channels of communication at the particular facilities where petitioners exercise their First Amendment rights. Applying the district court's factual findings, the court of appeals noted that "communicative activities flourish at all" of those facilities: "[petitioners] and their placards are visible to their intended audience," with petitioners able to "disseminate their message and elicit audience reactions"; petitioners' "voices are audible" and may also be enhanced by amplification equipment if desired; and members of the public continue to "congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments" or "don costumes." Pet. App. 23a; see J.A. 309.

SUMMARY OF ARGUMENT

The Massachusetts statute at issue in this case is content neutral, is narrowly tailored to significant governmental interests, and leaves open ample alternative channels of communication. Accordingly, it is a permissible time, place, or manner restriction under the First Amendment.

A. The 2007 statute is content neutral. It regulates conduct only, draws no distinctions on the basis of what a speaker is saying, and requires no inquiry into the content or nature of speech to enforce its prohibitions. Moreover, the statute was enacted in response to an extensive history of dangerous and

obstructive conduct around reproductive health-care facilities, and the Commonwealth thus acted independent of any speech-related goal when it sought to clear small areas outside those facilities to protect public safety and ensure unimpeded access to important health-care services.

Petitioners are wrong to suggest that the law is content based because it applies only to those particular areas. Because the legislature had before it no history of confrontation and intimidation around other types of facilities, its decision to enact a narrow statutory prohibition is evidence not of pretext or selectivity, but instead of an appropriate match between problem and solution. That petitioners' speech is unconstrained outside of the 35-foot buffer zone confirms that conduct, not content, was the legislation's target.

This Court has previously upheld statutes regulating conduct at or near specific facilities or identified places. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (state courthouses); *Heffron* v. *ISKON*, 452 U.S. 640, 650-651 (1981) (state fair); *Frisby* v. *Schultz*, 487 U.S. 474, 477 (1988) (residences). In addition, similar statutes at both the state and federal level address vexing problems such as picketing at funerals, *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011), even though the protests in question may well center around particular topics. Petitioners' approach to content neutrality would cast doubt on all such regulation.

Petitioners are also wrong to suggest the existence of viewpoint discrimination. The 2007 statute's exemption for facility employees or agents acting "within the scope of their employment," by its terms and as interpreted by the Massachusetts Attorney General,

privileges no speech; it simply permits the facility to conduct normal operations by allowing individuals who have job responsibilities that take them through the zone to go about their business. Moreover, petitioners' pleadings offered no factual allegations of selective enforcement to support a viewpoint discrimination claim.

B. The 2007 statute is also "narrowly tailored to serve * * * significant governmental interest[s]." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). The statute creates a buffer zone that is modest in size and that leaves unaffected the ability of petitioners or others standing outside the zone to speak, leaflet, or engage in any other activities protected by the First Amendment—including in areas that patients must cross to reach the facility in question. And Massachusetts arrived at that approach only after trying and failing to ensure public safety and access in a variety of other ways, including through use of a "floating" buffer zone modeled on the one at issue in *Hill* v. *Colorado*, 530 U.S. 703 (2000). The 2007 statute therefore does not sweep in substantially more speech than necessary to achieve the Commonwealth's goals.

Petitioners argue that the Commonwealth's interests can be equally well served by laws that target obstruction of reproductive health-care facilities or that prohibit violence or other criminal activity. But such laws deal with only the most "blatant and specific attempts" to endanger people or impede access, *Burson* v. *Freeman*, 504 U.S. 191, 206-207 (1992) (plurality opinion), and Massachusetts has already attempted to rely on them without success. The least restrictive alternative is not constitutionally required, and an

ineffective alternative is not constitutionally significant.

Petitioners also complain that the quiet conversation and leafleting in which they seek to engage would have little impact on the Commonwealth's interests. The law does not, in fact, bar those activities entirely; it merely requires that petitioners conduct them 35 feet away from a facility entrance or driveway. In any event, narrow-tailoring analysis must take into account not only petitioners themselves, but also everyone else who would crowd and effectively block entrances if no restriction existed. The 2007 statute is narrowly tailored to the "overall problem the government seeks to correct." *Ward*, 491 U.S. at 801.

C. Finally, the 2007 statute leaves open ample alternative channels of communication. Petitioners' ability to speak in any manner, so long as they do so without physically entering a zone that extends only 35 feet from a facility entrance or driveway, remains entirely unrestricted. And the record shows that petitioners have continued to convey their message effectively—using means including leafleting, quiet conversation, and signs—to patients who are approaching and within the buffer zone.

Petitioners contend that that these alternative channels are an imperfect substitute for the ability to follow patients right up to a facility's door. But this Court has already rejected the argument that a time, place, or manner restriction fails simply because it denies a speaker the preferred or even the most effective means of communication. *Heffron*, 452 U.S. at 653. Petitioners can continue to win the attention of their desired audience without deviating from the

message they wish to deliver, and the alternative channels available to them are thus amply sufficient.

D. This case does not provide a suitable opportunity for revisiting *Hill*. Unlike *Hill*, this case involves a fixed buffer zone, applicable to all speakers and not only those engaged in protest, education, and counseling. Moreover, unlike the 100-foot limitation in *Hill*, the 2007 statute affects conduct only within 35 feet of facility entrances and driveways. Regardless of the result in *Hill*, the law at issue here is constitutional.

ARGUMENT

The 35-foot buffer zone around entrances and driveways of reproductive health-care facilities in Massachusetts applies regardless of any message a speaker wishes to convey and affects no speech at all by persons standing outside the zone, whether directed at patients approaching or inside the zone. With respect to traditional public forums such as sidewalks and streets, Massachusetts may "impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The 2007 statute meets that test.

A. The Statute Is Content Neutral

1. Massachusetts' effort to safeguard the entrances and driveways of reproductive health-care facilities is content neutral. See *Ward*, 491 U.S. at 791 ("The

principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

First, the Massachusetts legislation regulates conduct, not speech. The statute does not refer to speech, let alone directly regulate it. Rather, it simply bars entering or remaining in a small area around reproductive health-care facilities' entrances and driveways. The law applies regardless of how affected speakers wish to express themselves, or whether they wish to discuss abortion, facilities' employment practices or accessibility to individuals with disabilities, local or national elections, or any other issue. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 643 (1994) ("laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral"). Enforcement of the statute therefore requires no inquiry into the content or nature of the speech. *Regan* v. *Time, Inc.*, 468 U.S. 641, 655-657 (1984) (plurality opinion) (statute content neutral where "the Government does not need to evaluate the nature of the message being imparted in order to enforce the * * * limitations"); Erwin Chemerinsky, *Constitutional Law* 936 (3d ed. 2006).

Second, the statute was enacted in response to an extensive history of dangerous and obstructive conduct immediately outside of Massachusetts facilities. See, *e.g.*, J.A. 31-89. The statute does not concern itself with the reason why people engaged in that conduct; it merely seeks to make the conduct stop. *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("content-neutral speech regulations are those

that are '*justified* without reference to the content of the regulated speech'") (quoting *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)); *Heffron*, 452 U.S. at 649 (regulation requiring that sales and solicitations at state fair take place at booths "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds"). In short, nothing in the statute privileges or disadvantages any viewpoint or any topic of conversation, or indicates disagreement with any particular speaker's message.

That analysis is consistent with this Court's decisions in other buffer zone cases. Writing for the Court in both *Madsen* and *Schenck*, for example, Chief Justice Rehnquist held that injunctions creating buffer zones for specified protesters around certain facilities were content neutral because they were imposed not on the basis of an "antiabortion message," but on the basis of protesters' "repeated[] violat[ion]" of a court order. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); see *Schenck* v. *Pro-Choice Network*, 519 U.S. 357, 372-374 (1997).

Likewise, in *Hill* v. *Colorado*, 530 U.S. 703 (2000), this Court found content neutral a Colorado law that created a 100-foot zone in front of health-care facilities inside which a person could not (absent consent) approach another person within eight feet "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id.* at 707. The Court explained that the law simply regulated "the places where some speech may occur" and did not make "reference to the content of the speech"; that it "was not adopted" due to "disagreement with the

message" conveyed by opponents of abortion; and that the governmental interests advanced were "unrelated to the content of the demonstrators' speech," even if enactment of the law "was motivated by the conduct of the partisans on one side of [the] debate." *Id.* at 719-720, 724.

The Massachusetts law at issue here poses even less cause for concern than the law the Court upheld in *Hill*. In *Hill*, the dissenting Justices would have deemed the law at issue content based on the ground that determining whether "protest, education, or counseling" is occurring requires evaluation of a message's content.[1] The Massachusetts law draws no such distinctions. It addresses only conduct, and it proscribes that conduct by people conveying any message or espousing any viewpoint. See Mass. Gen. Laws ch. 266, § 120E½(b).

2. The Massachusetts legislature limited the scope of its restrictions to the areas surrounding reproductive health-care facilities. Petitioners see this virtue as a vice (Br. 23-27), contending that it renders the statute content based. That argument lacks merit.

A governmental body may focus its legislation on the serious public-safety and access problems it actually experiences. Here, Massachusetts chose to limit the use of a buffer zone to reproductive health-care facilities because only those facilities had suffered the "significant public safety and patient access problem" the legislature sought to address. Pet. App. 165a.

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[1] See 530 U.S. at 742 (Scalia, J., dissenting) ("[w]hether a speaker must obtain permission before approaching * * * depends entirely on *what he intends to say* when he gets there"); *id.* at 766 (Kennedy, J., dissenting) ("[w]hether particular messages violate the statute is determined by their substance").

Petitioners are thus wrong to suggest that the legislature's justification is pretextual, or that the statute amounts to a "targeted burdening of speech" (Br. 25). The statute is instead a targeted regulation of conduct, with an "incidental effect on some speakers or messages but not others" purely because certain people have chosen to engage in that conduct in a particular location. *Ward*, 491 U.S. at 791; see *Madsen*, 512 U.S. at 763. Indeed, the fact that petitioners' speech is unconstrained outside of the 35-foot buffer zone confirms that conduct, not content, was the legislation's target.

Nor is the statute somehow underinclusive. To be sure, the Commonwealth's interest in "freedom from violence and obstruction" (Pet. Br. 24) extends to other kinds of buildings. But history matters. If violence and obstruction had occurred at other facilities and Massachusetts had legislated only with respect to reproductive health-care facilities, such selective legislation could raise First Amendment concerns. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 416-418 (1993). There is, however, no evidence of that kind of selectiveness here. Cf. *Hill*, 530 U.S. at 709 n.6 (Colorado legislature heard evidence about "other types of protests at medical facilities, such as those involving animal rights"); see *id.* at 723-724 (Colorado law did not "distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds").[2]

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[2] Contrary to petitioners' characterization (Br. 23-24, 26), *Hill* does not suggest any problem with that approach. See *Hill*, 530 U.S. at 724. Petitioners highlight language about a "general policy choice" (see Br. 24)—but the passage merely rejects the argument that the statute should have applied only to particular reproductive

Petitioners insist that Massachusetts must regulate more broadly, so as to cover every spot that "hosts any activity that *might* occasion protest or comment." Br. 24 (emphasis added). But content neutrality does not come only at the price of a restriction that is overly broad; "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson*, 504 U.S. at 207 (plurality opinion). Indeed, had Massachusetts attempted to do so, petitioners would no doubt have challenged the law as insufficiently tailored on that basis.

This Court has upheld time, place, or manner restrictions that apply only to the area around a certain type of facility or in a particular place. See, *e.g.*, *Heffron*, 452 U.S. at 650-651 (state fair); *Cox*, 379 U.S. at 562 (state courthouses); *Frisby*, 487 U.S. at 477 (residences); *Ward*, 491 U.S. at 791 (city bandshell); see also Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 69 (1987). "A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports." *Hill*, 530 U.S. at 724; see *ISKON* v. *Lee*, 505 U.S 672, 706 (1992) (Kennedy, J., concurring in judgment) (Port Authority's ban on solicitation is content neutral). And statutes prohibiting picketing at funerals, *Snyder*, 131 S. Ct. at 1218 & n.5, or at military funerals, 18 U.S.C. 1388, which target a vexing problem, are not content based simply because protests at such events may well center around a few particular topics. See, *e.g.*, *Phelps-*

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health-care facilities where protests had taken place, and explains why the statute was subject to the *Ward* test rather than the stricter test applied in *Madsen*. See 530 U.S. at 731.

Roper v. *City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc) (city ordinance restricting picketing and other protest activities at funerals is content neutral). Were petitioners' analysis of content neutrality correct, such decisions would be thrown into question, and governmental bodies would be hamstrung in addressing serious issues faced by their communities with respect to conduct affecting (for example) residences, funerals, airports, courthouses, and hospitals.

3. Petitioners are also incorrect (Br. 27-34) that the statute's exemption for facility employees or agents acting "within the scope of their employment" amounts to discrimination on the basis of viewpoint. Mass. Gen. Laws ch. 266, § 120E½(b). The statute does not, by its terms, contemplate that employees or agents will engage in expressive conduct while inside a buffer zone; it simply permits the facility to conduct normal operations by allowing individuals who have job responsibilities that take them through the zone to go about their business. And the Massachusetts Attorney General's guidance confirms that the exception does not permit political discussion or expression of personal views inside a buffer zone by anyone—including facilities' employees or agents. The construction of the statute reflected in the guidance is a reasonable one that is entitled to significant weight. See *Ward*, 491 U.S. at 795-796 (relying on city's administrative "interpretation" of a challenged restriction); *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982); see also *Boos* v. *Barry*, 485 U.S. 312, 330 (1988).

In addition, as the court of appeals noted, Pet. App. 16a, petitioners' pleadings made no factual allegations of selective enforcement that would support a view-

point discrimination claim. For that reason, petitioners' comparison (Br. 30-31) of this case to *Hoye* v. *City of Oakland*, 653 F.3d 835 (9th Cir. 2011), is inapt. *Hoye* involved a city ordinance creating a no-approach zone similar to the one upheld in *Hill*. As a matter of official policy, the city permitted self-appointed escorts (who had no official affiliation with the relevant facilities) to approach patients without consent in order to "encourage entry into the clinic for the purpose of undergoing treatment," while barring such approaches by persons expressing the opposite viewpoint. *Id.* at 850; see *id.* at 851. The case at hand involves no such "government favoritism." Pet. Br. 30. Massachusetts has, at worst, imperfectly enforced its law without regard to the viewpoint of those who slip through the cracks. It has not endorsed speech advancing only one side of a divisive issue. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52 (1994); see also *Menotti* v. *City of Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005).

B. The Statute Is Narrowly Tailored To Serve Significant Governmental Interests

The 2007 statute also meets the second requirement for a proper time, place, or manner restriction: it is "narrowly tailored to serve * * * significant governmental interest[s]." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

1. Petitioners do not appear to quarrel with the proposition that the governmental interests at stake here are significant and legitimate. See Br. 45. Massachusetts has a powerful interest in ensuring public safety and order—in preventing harm to persons or property, in preserving the ability of the public to use streets and sidewalks, and in keeping the way to busi-

nesses and other buildings open. See, *e.g.*, *Heffron*, 452 U.S. at 650 ("[The] State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen."); see also *Schenck*, 519 U.S. at 376 (injunction justified by interest in ensuring public safety and order, including concern about "fights that threatened to (and sometimes did) develop"); *Madsen*, 512 U.S. at 767-768; cf. *United States* v. *Grace*, 461 U.S. 171, 182-184 (1983). In addition, the Commonwealth has a powerful interest in protecting citizens' access to lawful reproductive health-care services. See *Hill*, 530 U.S. at 715; see also *Madsen*, 512 U.S. at 758-759, 767-768, 772-773 ("the State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services"); *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783-784 n.12 (1979).

The 2007 statute—forged in the crucible of experience—is narrowly tailored to serve those interests. See *Ward*, 491 U.S. at 797-800 (explaining that narrow tailoring requirement is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and is "not substantially broader than necessary" to achieve that interest (citation omitted)). As the legislative record reflects, neither specific prohibitions on obstruction and intimidation nor the "floating" buffer established by the 2000 statute ensured public safety and access to reproductive health-care facilities. Enforcement of those laws was difficult

for a variety of reasons, including challenges involved in identifying violators in chaotic environments. See, *e.g.*, Pet. App. 145a-147a; J.A. 50, 68-70. Those arrested or charged returned again and again to the facilities, despite the best efforts of the police, see, *e.g.*, *id.* at 69-71, or new violators came in waves to take their places. And people who were not themselves violating laws that barred knowing obstruction, or approaching patients more closely than the "floating" buffer permitted, nevertheless collectively made access to the facilities difficult or impossible, because they sometimes were drawn into conflict and because (like petitioners themselves, see, *e.g.*, *id.* at 176, 189, 252) they all wanted to stand directly in front of driveways and entrances. See, *e.g.*, *id.* at 62, 67, 77-78, 86, 122-124; Pet. App. 138a; see also *In re Opinion of the Justices to the Senate*, 723 N.E.2d 1, 5 (Mass. 2000) (noting difficulties involved with "close proximity" of "advocates on both sides"); J.A. 51 (noting that patients were sometimes driven away).

Based on that experience, Massachusetts enacted the current 35-foot buffer zone. See J.A 31-89. That law regulates conduct within a space extending fewer than 12 yards from entrances and driveways—about "[h]alf the distance from home plate to the pitcher's mound," J.A. 81, and even less than that at the Boston facility, see J.A. 293-294—that the legislature determined needed to be kept clear. The law does not affect the ability of petitioners or others standing outside the buffer zone to speak, counsel, leaflet, picket, or engage in any other activities protected by the First Amendment—including in areas through which patients must cross to reach the facility in question. See, *e.g.*, J.A. 141, 148. Petitioners can approach pa-

tients outside the buffer zone to engage in counseling and hand out literature, cf. *Hill*, 530 U.S. at 707, and speakers can be heard, and their signs and placards seen, from within the zone itself, prompting patients to leave the zone to accept a leaflet or engage in a quiet conversation. See, *e.g.*, Pet. App. 23a; J.A. 98-99, 126-127, 274-275. Thus, members of the public who wish to engage with patients entering a facility remain close enough to deliver their message, but not so close as to interfere with public safety or access. See *infra* pp. 28-33 (discussing ample alternative means of communication).

The 2007 statute is thus narrowly tailored. In addressing an acute and persistent threat to public safety and order, Massachusetts tried various approaches over time, gauged their effect on that threat and on the public's freedom of expression, and ultimately arrived at a workable solution that is not "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800; see *Schenck*, 519 U.S. at 380-381 (explaining that "the District Court was entitled to conclude" based on experience that "the only way to ensure access was to move *all* protesters away from the doorways"); *Madsen*, 512 U.S. at 768-771 ("The failure of the first [injunction] order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order."). Indeed, that solution "eliminates no more than the exact source of the 'evil' it seeks to remedy," *Frisby*, 487 U.S. at 485-486, because every person who stands right outside the facilities necessarily contributes to the overall problem at which the 2007 statute was targeted. See *City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). The Common-

wealth's choice therefore should not be second-guessed. See *Ward*, 491 U.S. at 803; see also *Hill*, 530 U.S. at 725-730; *Burson*, 504 U.S. at 210 (plurality opinion).

2. In contending that the 2007 statute is not narrowly tailored, petitioners assert (Br. 35-44) that the Commonwealth could have regulated in a less restrictive fashion. But a time, place, or manner regulation—unlike a law subject to strict scrutiny, see *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) (cited in Pet. Br. 35, 39, 44)—is not "invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward*, 491 U.S. at 797-798 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)). Petitioners' various arguments fail to demonstrate that the 2007 law sweeps in substantially more speech than necessary to achieve the Commonwealth's goals.

First, petitioners contend that laws directed at individuals who knowingly obstruct reproductive health-care facilities, or who engage in violence or other criminal activity, should be deemed sufficient. See Br. 35-38 (citing, *e.g.*, 18 U.S.C. 248(a)(1) and Mass. Gen. Laws ch. 266, § 120E½(e)). Even if it were true that those laws represented a less restrictive means of advancing the government's goals, Massachusetts would not be required to rely on them to the exclusion of other action. See *Ward*, 491 U.S. at 797-798. More to the point, as described above (pp. 2-6, 22-23, *supra*), Massachusetts has already attempted to rely exclusively on those kinds of laws, and that attempt was a failure. Threats to public safety and access continued even after a few "specific wrongdoers" (Pet. Br. 37) were removed from the scene.

This Court has previously recognized such realities. In *Burson*, which upheld a 100-foot buffer zone outside of polling places, the Court explained that "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they deal with only the most blatant and specific attempts to impede elections," and "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." 504 U.S. at 206-207 (plurality opinion). The same analysis applies here, where patients and the public are at risk, see *Schenck*, 519 U.S. at 380-382—and, indeed, is even more apt here than it was in *Burson*, because in that case the proposed alternative had not actually been tried and found wanting. See 504 U.S. at 208-209 (plurality opinion).

Second, petitioners argue that the law impermissibly blocks quiet conversation, conversations held at close quarters, and leafleting, all of which they would engage in within the buffer zone were they permitted to do so. See Br. 40-44. The law does not, in fact, block those activities entirely; rather, it bars petitioners and others only from carrying them out by entering or standing in a small area extending from facilities' doors and driveways. It does so because no other viable means has been found for keeping those areas safe and clear.

Whether or not any difficulties would arise if petitioners *alone* were permitted to talk and leaflet without any "place" restriction is beside the point, because Massachusetts must account for everyone who would crowd up to the facilities if no such restriction existed. See *Heffron*, 452 U.S. at 653-655 (criticizing the lower court's failure to "take into account the fact that any

* * * exemption cannot be meaningfully limited to [plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern"); *Lee*, 505 U.S. at 685; *Clark*, 468 U.S. at 297-298. Whether one, or a few, particular people will cause a disruption is not determinative of the narrow tailoring question. "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801; see also *Albertini*, 472 U.S. at 688-689.[3]

In the end, there is nothing remarkable about the conclusion that the 2007 statute is narrowly tailored. This Court has upheld as narrowly tailored laws that limit presence or behavior within site-specific zones in a variety of contexts. See, *e.g.*, *Burson*, 504 U.S. at 211 (plurality opinion) (ban on campaigning within 100 feet of polling place); *Boos*, 485 U.S. at 330-332 (restriction on congregating within 500 feet of embassy); see also *Cox*, 379 U.S. at 562, 564 (limitations on picketing near courthouses); *Frisby*, 487 U.S. at 484-485 (same with respect to private residences); see generally *Carey* v. *Brown*, 447 U.S. 455, 470-472 (1980) (stating that "no mandate in our Constitution leaves States and governmental units powerless to pass laws to

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[3] Indeed, were the rule otherwise, no buffer zone would ever be permissible; as to a zone near a political convention, see *Marcavage* v. *City of New York*, 689 F.3d 98 (2d Cir. 2012), cert. denied, 133 S. Ct. 1492 (2013), or a military funeral, cf. 18 U.S.C. 1388; see *Phelps-Roper* v. *Koster*, 713 F.3d 942 (8th Cir. 2013), or a high-profile religious service, see *Mahoney* v. *United States Marshals Serv.*, 454 F. Supp. 2d 21 (D.D.C. 2006), a plaintiff could readily claim that he planned only to talk quietly to attendees near the door.

protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of" homes or "public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals" (citation omitted)). And, more specifically, this Court has upheld comparable buffer zones around reproductive health-care facilities while applying a more stringent tailoring test than the one used to assess time, place, or manner restrictions. See *Madsen*, 512 U.S. at 757-758, 764-766 (applying test for assessing injunction, which asks whether the relevant provisions "burden no more speech than necessary to serve a significant government interest," and upholding "the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded"); *Schenck*, 519 U.S. at 380 (upholding fixed 15-foot buffer zone while invalidating floating buffer zone). Under the less exacting scrutiny applicable here, the 2007 statute passes muster.

C. The Statute Leaves Open Ample Alternative Channels For Communication

The Massachusetts statute also "leave[s] open ample alternative channels of communication." *Ward*, 491 U.S. at 802. Contrary to petitioners' argument, the court of appeals did not suggest that petitioners' only remaining options are "shouting, using bullhorns" or "dressing in costumes," Br. 46, although the members of the public who engage in such activities may continue to do so. Rather, the court correctly concluded that the 2007 statute "places no burden at all on [petitioners'] activities outside the 35-foot buffer zone," including "offer[ing] either literature or spoken advice to pedestrians" and conveying messages that

"may be seen and heard by individuals entering, departing, or within the buffer zone." Pet. App. 110a-111a; see *id.* at 22a-26a (explaining how "communicative activities flourish at all three" facilities at issue). Cf. *Heffron*, 452 U.S. at 655 n.16 ("relevant public forum" is entire state fair, not just area of fair subject to restrictions).

First, petitioners can and do "engage fellow citizens" who are outside the buffer zone and are approaching a facility "in peaceful conversations." Pet. Br. 47; see, *e.g.*, J.A. 126-127 ("[p]rotestors continue to have close contact with patients and others approaching the clinic"). For example, without entering a buffer zone, petitioners (and others) go up to patients who are nearing the Boston facility and—unhampered by any restrictions—speak with them, offer them help, and provide them with literature. See, *e.g.*, J.A. 288, 306. Protesters also display signs and religious symbols, pray aloud, sing songs, and engage in other expressive activity that is heard by passersby as well as patients. Pet. App. 6a, 23a; see *Madsen*, 512 U.S. at 769-770 (noting that those excluded from 36-foot zone could "still be seen and heard" from within).

Indeed, the Massachusetts law would appear to permit closer and more sustained contact with patients approaching facility entrances by sidewalk than did the Colorado law at issue in *Hill*. The Massachusetts law operates only for the last 35 feet of the journey, while the Colorado law created a "floating" buffer that limited "approach[es]" within 100 feet of facility entrances. See *Hill*, 530 U.S. at 707-708; see also *Burson*, 504 U.S. at 210 (plurality opinion) (observing that it takes 15 seconds to walk the final 75 feet into a polling place).

Second, even after a patient enters the buffer zone, petitioners may continue to communicate with that person. They can quietly ask someone with whom they have already been talking to stop and continue the conversation—something a willing person is likely to do. They can ask someone to whom they have not yet spoken to listen, or to step out of (or to the edge of) the zone for a longer discussion or to accept a piece of literature. See, *e.g.*, J.A. 126-127 (protesters "continue to communicate verbally" with patients who have entered the zone); see also *id.* at 98, 113, 116-118. Petitioners' voices remain "audible" in that context, Pet. App. 23a; see, *e.g.*, J.A. 113, 117-118, 274-275, 278 (person in zone can hear people calling out messages such as "girls, we love you, please come talk to us" and "anything you need, we can help you")—although they may have to compete with others, including those opposing abortion whose messages petitioners themselves find "counterproductive" or overly "loud." J.A. 149-150, 215.[4]

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[4] The buffer zone at the Boston facility covers an area extending 22 to 26 feet from the building, which can be completely encircled by a small group of people. See, *e.g.*, J.A. 300, 303-304; see also Pet. App. 39a-40a. Speaking to patients is more difficult at the Springfield and Worcester facilities, because most patients arrive by car and walk from private lots to facility entrances without setting foot on any public way. But people continue to make their message heard at those sites through a variety of means, including quiet conversation. See, *e.g.*, Pet. App. 7a-8a, 56a-57a; J.A. 116-120, 200, 217, 274-278, 291-292. And to the extent the 2007 law prevents close approaches to moving vehicles, that is precisely the kind of interaction that the Massachusetts legislature deemed unsafe, with considerable supporting evidence. See, *e.g.*, J.A. 12-16, 18-22, 41, 51, 55, 61, 88-89, 99.

Finally, petitioners and others remain free to communicate their message throughout the community by the use of various media. The means available to them include disseminating phone numbers or website addresses to provide assistance and publicizing their views through counseling clinics (including clinics located directly across the street from facilities where women obtain reproductive health care). See J.A. 143, 256-266; cf. *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 539-540 (1992).

Petitioners are having considerable success reaching their intended audience through means of various techniques, including their preferred method of close conversation. For instance, petitioner McCullen asserts that since the 2007 law went into effect she has successfully convinced about 80 women on their way to the Boston facility not to proceed with an abortion, conveying her message by "standing on the sidewalk outside the clinic and offering to speak with people and giving them literature." J.A. 148-149; see *id.* at J.A. 141 (petitioner McCullen hands out 15 to 20 pamphlets a day); see also *id.* at 171-172, 181-182, 288, 306. And although petitioners have contended that they cannot circumnavigate the buffer zone quickly enough to reach some patients, see *id.* at 134, 155, 164, 177, the Attorney General's guidance specifies that "an individual may cross through the buffer zone to reach and speak with someone outside the zone," J.A. 93; see also *id.* at 159 (discussing coverage by teams).

Thus, contrary to petitioners' contention, this is not a case in which "[t]he alternatives * * * are far from satisfactory." *Linmark Assocs., Inc.* v. *Willingboro Tp.*, 431 U.S. 85, 93-94 (1977). Rather, the alternatives available here reach precisely the same "audi-

ence"—and provide a good "opportunity" to "win the[] attention" of that audience, *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion)—without forcing petitioners to convey "a message quite distinct from" the one that they would deliver if they could enter the buffer zone. *Gilleo*, 512 U.S. at 56-57. Indeed, those alternatives are in every meaningful way a "practical substitute" for the narrow channel that Massachusetts has foreclosed. *Id.* at 57; see, *e.g.*, *Frisby*, 487 U.S. at 482-484; *Clark*, 468 U.S. at 295.

Petitioners nevertheless argue that no possible alternatives can substitute for the ability to follow patients right up to a facility's door or to stand directly in front of the door in the first instance. *E.g.*, Br. 48-49; see J.A. 176, 252; *Hill*, 530 U.S. at 724. But this Court has already rejected the argument that a time, place, or manner restriction fails simply because it denies a speaker his or her preferred or even most effective means of communication. Thus, in *Heffron*, this Court upheld the challenged restriction despite respondent's argument that its members could successfully communicate and raise funds "only by intercepting fair patrons as they move about, and * * * stopping them momentarily or for longer periods as money is given or exchanged for literature." 452 U.S. at 653.

It could hardly be otherwise. If an alternative channel of communication were required to be a perfect substitute for the restricted one, then no time, place, or manner restriction would ever be upheld. See *Clark*, 468 U.S. at 291-297 ("reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression"); *Kovacs*, 336 U.S. at 88 (plurality opinion) (upholding re-

striction on amplification though "more people may be more easily and cheaply reached by sound trucks"). No doubt protesters outside schools, funerals, political conventions, courthouses, and meetings of international leaders could often convey their messages most effectively unhampered by any time, place, or manner restrictions. Yet courts have deemed such restrictions constitutional, on the ground that ample communicative *alternatives* remain. See, *e.g.*, *Bl(a)ck Tea Soc'y* v. *City Of Boston*, 378 F.3d 8, 14-15 (1st Cir. 2004). The same result is appropriate here.

D. This Court Should Not Overrule *Hill* v. *Colorado*

Petitioners assert (Br. 53-56) that this Court should overrule its decision in *Hill* to the extent that *Hill* supports affirmance. But this case does not present a suitable opportunity for revisiting that decision. This case involves a small, fixed buffer zone that applies regardless of what the person entering or remaining in it is saying, whereas *Hill* involved a "floating" buffer zone, operating within a larger fixed area, that applied to those engaged in protest, education, or counseling. Moreover, the primary controversy among the members of the *Hill* Court relates to a question that this case does not present: whether a law targeted at protest, education, and counseling can be content neutral, or whether such a law necessarily demands that speech be categorized based on the message that it conveys. See, *e.g.*, *Hill*, 530 U.S. at 742-746 (Scalia, J., dissenting); *id.* at 767-769 (Kennedy, J., dissenting). The buffer zone in this case is not, as petitioners suggest (Br. 19), necessarily stricter than the zone at issue in *Hill*—but it is different, and calls for a different analysis.

In any event, the doctrine of stare decisis counsels against revisiting that decade-old decision. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986); see also, *e.g.*, *Phelps-Roper*, 713 F.3d at 950-951 (relying on *Hill* to uphold buffer zone around funeral). Although that doctrine is not an "inexorable command," this Court has recognized that precedents—including those involving constitutional questions—should not be overturned absent "some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (citations omitted). No such justification exists here; *Hill* is a workable, carefully considered decision, and its "doctrinal underpinnings" have not been "undermined." *Id.* at 443. Accordingly, even were there some reason to revisit *Hill* in this case, its holding should not be disturbed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-1168

In The
Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003).

This case has grave importance for the free speech jurisprudence governing leafletting and other classic First Amendment activities, and is therefore of special interest to the ACLJ.

SUMMARY OF ARGUMENT

The lower court relied heavily upon this Court's majority opinion in *Hill v. Colorado*, 530 U.S. 703 (2000). The *Hill* decision, however, is profoundly flawed. *Hill* deeply unsettled the constitutional law of free speech. In several crucial respects, *Hill* rejected – without overruling – well-established norms of First Amendment jurisprudence. In particular, the *Hill* Court embraced (1) a presumption of an unwilling audience for speech, (2) the treatment of a content-based restriction as content-neutral, (3) strait-jacket

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[1]The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

limitations on leafletting on public sidewalks, and (4) prophylactic restrictions on speech. None of these holdings can be reconciled with prior precedent. Hence, *Hill* created an internal conflict in the constitutional law governing free speech activities.

This Court should repudiate *Hill*.

ARGUMENT

The majority opinion in this Court's divided ruling in *Hill v. Colorado*, 530 U.S. 703 (2000), made bad law and should be disavowed.

Hill upheld a state statute that created the crime of approaching-with-intent-to-speak-or-leaflet. *Id.* at 707. For the *Hill* majority to uphold such a blatant violation of the First Amendment right to free speech, the *Hill* Court had to trample over numerous well-settled free speech doctrines.

Hill's profound distortion of First Amendment law is at issue here, where the First Circuit in this case has relied repeatedly upon *Hill*, both in its decision below, *see McCullen v. Coakley*, 708 F.3d 1, 4, 7, 8 n.4, 10, 12, 13, 14 (1st Cir. 2013), and in its previous ruling on a prior appeal in the case, *McCullen v. Coakley*, 571 F.3d 167, 172-73, 180-83 (1st Cir. 2009).

The First Circuit said that *Hill* "shed new light on the legal landscape." 571 F.3d at 173. That is one way of putting it. Another would be to say that *Hill* "contradict[ed] more than a half century of well-established First Amendment principles." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting). For the reasons set forth below, among others, this Court should repudiate *Hill*.

THE DECISION IN *HILL v. COLORADO* IS IRRECONCILABLE WITH PREEXISTING CONSTITUTIONAL NORMS GOVERNING FREE SPEECH AND THUS HAS PROFOUNDLY DESTABILIZED THE LAW.

The simultaneous existence of two lines of contradictory precedent is profoundly destructive of the rule of law. Such internal inconsistency enables courts to decide arbitrarily which line of precedent to invoke; hence, parties cannot predictably gauge the law governing their activities.

When the uncertainty of dueling precedents arises in the context of free speech, the consequence is especially bad: the uncertainty of legal sanctions deters speech by all but the heroic, the foolhardy, and the judgment proof.

This Court's decision in *Hill* has had precisely this destabilizing effect on the rule of law. Because *Hill* is irreconcilable with numerous prior decisions of this Court, yet did not purport to overrule such decisions, the result is an unresolved contradiction, the simultaneous existence of diametrically opposed precedents from which each lower court can pick and choose as it sees fit. This is *not* the rule of law.

Petitioners have explained how the Massachusetts buffer statute at issue here is unconstitutional even under *Hill*. Amicus wishes to highlight the perniciousness of *Hill* itself, urging this Court to renounce *Hill* before it further corrodes the fabric of the law.

Hill is in many respects "antithetical to our entire First Amendment tradition," 530 U.S. at 768 (Kennedy, J., dissenting). *See also id.* at 762 (Scalia,

J., dissenting) ("an unabashed repudiation of our First Amendment doctrine"). While not providing an exhaustive list, amicus wishes to highlight some of the ways the *Hill* decision creates contradictory points in First Amendment jurisprudence.

1. Audience presumed unwilling

The *Hill* Court presumed as a matter of law that anyone approaching an abortion business is an "unwilling recipient" of any message a pro-life sidewalk counselor has to offer. 530 U.S. at 716-18, 723, 727, 734.[2] This is both inaccurate as a matter of fact (some would-be abortion patients do accept leaflets or conversation from sidewalk counselors, and some ultimately choose not to abort, *see, e.g.*, Brief for Petitioners at 9, 11, 15) and offensive to the many "thoughtful and law-abiding sidewalk counselors like petitioners," 530 U.S. at 727. More importantly, this proposition in *Hill* is flatly inconsistent with this Court's First Amendment case law. As long ago as *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court has held invalid restrictions on speech that deem such speech categorically unwelcome. As this Court noted in *Martin*, truly unwilling listeners can properly be protected by enforcing the "previously expressed

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[2]More specifically, the Court equated the situation of someone who has *declined* an offer to communicate, *id.* at 717 ("If, however, the offer is declined"), 718 ("after an offer to communicate has been declined"), with the situation of one who has *not yet responded*. (The statute required consent prior to the approach-with-intent-to-communicate, *id.* at 707 n.1, and thus such an approach is a crime "if the pedestrian does not consent," *id.* at 734.) *Hill* treated both as "unwilling listeners," *id.* at 718.

will" not to receive such messages, *id.* at 148. *Hill*, by contrast, inverted the rule: no one can speak unless they obtain *previously expressed consent*. 530 U.S. at 734 ("regulations . . . apply if the pedestrian does not consent"). *Compare Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (homeowner can take initiative to rebuff particular mailings, in advance, at will); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (offer of message may rightfully be declined; by contrast, initial offer, if done in an inoffensive way, is within traditional bounds of free speech).

2. Content-based restrictions deemed content-neutral

The *Hill* Court ruled that the statute challenged in that case was content-neutral. This conclusion was doubly flawed – and fundamentally so.

a. *Place as proxy for content*

First, the *Hill* statute applied only at any "health care facility," 530 U.S. at 701 n.1. "By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination." 530 U.S. at 767 (Kennedy, J., dissenting). Tying the restriction to locations in this way is inexplicable other than as a proxy for content restriction. One does not restrict residential picketing "at the residence of any physician," for example, without aiming at picketing over some medical controversy. One does not restrict protests "at any animal testing facility" without

targeting protests related to such facilities. *Cf. Carey v. Brown*, 447 U.S. 455, 457, 460-61 & nn.4-5 (1980) (statute linked to "place of employment involved in a labor dispute" treated as tied to topic of labor). That the restriction in *Hill* technically also applied to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," *Hill*, 530 U.S. at 723, is of little comfort where those other speakers have no particular reason to be at "health care facilities." A restriction on demonstrations outside businesses that dump effluents into waterways is hardly content-neutral just because it limits not just anti-pollution protesters but also pro-gun demonstrators.

b. Express verbal content regulation

Second, the statute challenged in *Hill* was expressly content-based – restricting only oral "'protest, education, or counseling,'" 530 U.S. at 707 n.1 (quoting statute), while leaving unrestricted the remaining universe of messages, such as "pure social" conversation, *id.* at 721 (or, for that matter, commercial sales pitches). The *Hill* majority declared this statute nevertheless content-neutral if the *justification* for the restriction was content-neutral, *id.* at 720. This directly contradicts the precedent of this Court. "[W]hile a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642-43 (1994). That is,

for a statute to be content-neutral, it must be neutral *both* textually *and* in its purpose. *Accord Bartnicki v. Vopper*, 532 U.S. 514, 526 & n.9 (2001).

The *Hill* majority proffered three reasons in support of its conclusion that the statute challenged in that case was content-neutral, but all are transparently inadequate.

"First, [the statute] is not a 'regulation of speech.'" *Id.* at 719. Nonsense. The statute did not ban approaches as such. Only an approach *to communicate* was criminalized. *Id.* at 708 n.1 ("'No person shall knowingly approach another person within eight feet of such person, unless such other person consents, *for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling* with such other person in the public way or sidewalk area'") (quoting statute; emphasis added). A regulation that only applies to speech is, necessarily, a regulation of speech. *E.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984) (analyzing restriction on placement of handbills as a "regulation on speech").

"Second, it was not adopted because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719. This was a highly dubious factual premise, as the law was plainly enacted to further the interests of the abortion lobby.

> One need read no further than the statute's preamble to remove any doubt about the question. The Colorado Legislature sought to restrict "a person's right to protest or counsel against certain medical procedures." The word "against" reveals the legislature's desire to restrict discourse on one

> side of the issue regarding "certain medical procedures." The testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion, a point the majority acknowledges.

530 U.S. at 768-69 (Kennedy, J., dissenting) (citation omitted). *See also Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. Ct. App. 1995) ("testimony was presented concerning the conduct of some anti-abortion protesters at various medical clinics"). But more importantly, the government's disagreement with the message is not a required element: "while a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases," *Turner*, 512 U.S. at 642. Obviously, a law that bans discussion of civil rights on a city plaza, for example, would not be content-neutral just because the city officials profess – in all honesty – that they support civil rights but want to avoid crowds on the plaza.

"Third, the state's interests in protecting access and privacy, and providing police with clear guidelines, are unrelated to the content of the demonstrators' speech." *Hill*, 530 U.S. at 719-20. But this proves too much, as the same could be said of any government regulation that proffers "access," "privacy," or "clarity" as interests. The "mere assertion of a content-neutral purpose" does not "save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-43.

In short, *Hill* is utterly inconsistent with this Court's established tests for content-neutrality.

3. Leafletting hobbled

While the *Hill* statute did not *absolutely* ban leafletting outside abortion facilities, it did drastically hobble such leafletting. Under the *Hill* statute, leafletters could not approach close enough merely to *offer within reach* a flyer, without first obtaining the passerby's consent. 530 U.S. at 707 & n.1, 727-28. At best, leafletters could stand still "near the path of oncoming pedestrians and proffering" the material like a parking garage ticket dispensing machine. *Id.* at 727. By contrast, the precedents of this Court, aside from *Hill*, uphold vigorous First Amendment protection for leafletting. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *United States v. Grace*, 461 U.S. 171 (1983); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Notably, this constitutional protection for leafletting holds true even when the ban is not geographically absolute. As *Grace* illustrates, it is unconstitutional to ban leafletting on the sidewalks of just one particular building. *See also Schneider*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Nor can the controversial nature of the topic of the handbills justify such a restriction. "Indeed, . . . handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347.

Nor need the ban be unconditional; requiring prior permission to offer the material, as in *Lovell* and

Schneider, is likewise invalid. To be sure, the *Hill* statute required that the necessary "permission" to offer a leaflet must be obtained, not from the government, but from private pedestrians. But this makes the permission requirement worse, not better. The government must at least follow non-arbitrary, non-discretionary standards when licensing speech. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Private individuals face no such constraints, and thus can be wholly arbitrary, even viewpoint-based, in withholding consent. This is perfectly acceptable when a private individual is controlling the flow of information *into the home*, *Rowan*, or deciding whether to *accept* a handbill from a leafletter. But giving private parties licensing power over the mere *offer* of information *on a public way* is an entirely different matter. To suppress the right to speak, picket, or leaflet in a public place absent license from unconstrained private parties, under penalty of criminal enforcement, is even worse than an unconstitutional after-the-fact heckler's veto. Indeed, if it is unconstitutional merely to charge a higher permit fee based upon potential adverse audience reaction, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992), then it is necessarily unconstitutional to ban the speech altogether absent actual approval from the audience.

Under this Court's precedents, then,

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to

> the communication of ideas by handbills and literature as well as by the spoken word.

Jamison, 318 U.S. at 416.

Hill's miserly allowance of minimal freedom to leaflet is entirely inconsistent with the jealous constitutional protection recognized in these other cases.

4. Prophylactic restrictions on speech approved

Hill expressly approved a statute taking "a prophylactic approach" to speech regulation, 530 U.S. at 729, i.e., sweeping up substantial amounts of "harmless" *(id.)* speech as part of an effort to address proscribable misconduct. It is difficult to imagine a proposition more antithetical to this Court's free speech case law. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Accord Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same); *Edenfield v. Fane*, 507 U.S. 761, 777 (1983) (quoting *Button* and noting that even commercial speech may not be subjected to broad prophylactic restrictions); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612, 616 (2003) (noting condemnation of prophylactic restrictions on charitable solicitation). *But cf. Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 382 (1997) (approving prophylactic *injunctive* restrictions on *particular defendants*).

* * *

The *Hill* decision, by announcing several novel constitutional rules in profound tension with this Court's existing free speech jurisprudence, has deeply destabilized the law. This Court should disavow *Hill*.

CONCLUSION

This Court should reverse the judgment of the First Circuit and, in particular, repudiate *Hill v. Colorado*.

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September 13, 2013

AMICUS CURIAE BRIEF

RECORD
AND

No. 12-1168

SEP 1

IN THE

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ELEANOR MCCULLEN, *et al.*,

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—v.—

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ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Massachusetts is one of its statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended the right to free speech on the public streets, and has appeared before this Court on numerous occasions in support of that principle, from *Hague v. CIO*, 307 U.S. 496 (1939), to *Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011).

At the same time, the ACLU has long been committed to preserving a woman's constitutional right to decide to end a pregnancy. The ACLU has therefore participated in every major reproductive rights case decided by this Court over the past fifty years, beginning with *Poe v. Ullman*, 367 U.S. 497 (1961), and extending through *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. We have also consistently argued in this context and in others that constitutional rights can quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation, and harassment. Accordingly, the ACLU supported passage of the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248. Likewise, we agreed with this Court's view in *Schenck v. Pro-Choice Network of*

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[1] Letters consenting to the filing of amicus briefs have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Western New York, 519 U.S. 357 (1997), that specific clinic protestors who had engaged in prior unlawful conduct could be subject to a narrowly crafted injunction imposing reasonable time, place, and manner restrictions on their demonstration activity.

Based on this experience, the ACLU deeply believes that the volatile issue of abortion clinic protest must not be resolved by sacrificing either the right to access an abortion or the right to engage in peaceful political protest. Rather, the burden in each case is to arrive at a solution that accommodates both rights, and that does so in a principled way that is consistent with our constitutional tradition. This case once again poses the question of how that should be done. Its proper resolution is thus a matter of substantial interest to the ACLU and its members.

STATEMENT OF THE CASE

In 2007, the Massachusetts legislature enacted a statute that regulates activity outside "reproductive health care facilities" within the state.[2] The statute establishes a 35-foot fixed buffer zone around entrances, exits, and driveways of reproductive health care facilities and prohibits any person from "knowingly enter[ing] or remain[ing] on a public way or sidewalk" within the 35-foot zone.[3]

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[2] The full text of the statute, Mass. Gen. Laws ch. 266, § 120E 1/2, is set forth at Pet. App. 219a–221a. "Reproductive health care facility" is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." *Id.* § 120E 1/2(a).

[3] The prohibition on entering or remaining in the buffer zone is in effect only during a reproductive health care facility's

Mass. Gen. Laws ch. 266, § 120E 1/2(b). Four categories of persons are exempted from the prohibition: "persons entering or leaving such facility," "employees or agents of such facility acting within the scope of their employment," law enforcement and other municipal employees and agents acting within the scope of their employment, and persons traveling on the public sidewalk or street "solely for the purpose of reaching a destination other than such facility." *Id.* Anyone knowingly violating the statute is subject to both civil and criminal penalties. *Id.* § 120E 1/2(d)–(f).

The 2007 statute amended an earlier Massachusetts law, enacted in 2000, that established floating 6-foot buffer zones around persons or vehicles within 18 feet of an entrance or driveway to a reproductive health care facility. An Act Relative to Reproductive Health Care Facilities, 2000 Mass. Acts 1030–31, 2000 Mass. Legis. Serv. Ch. 217 (West). Inside the designated area, no person could "knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consent[ed], for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* § 2.

The preamble to the 2000 statute makes clear that in regulating expressive activities near such facilities, the Massachusetts legislature was attempting to balance "the first amendment rights of

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business hours, and only if "the area contained within the [buffer zone] is clearly marked and posted." *Id.* § 120E 1/2(c).

persons to express their views, assemble and pray near reproductive health care facilities" against "the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm." *Id.* § 1(c). The preamble also addresses the goals of increasing public safety, maintaining traffic flow, and facilitating safe and effective medical services at abortion clinics. *Id.* § 1(a)–(b), (d).

The statute's enactment followed incidents of violence and harassment at Massachusetts clinics, including the blockading of entrances, the intimidation of staff and patients, and the murder of two clinic employees. J.A. 12–24. Employees and volunteers at Massachusetts clinics testified at legislative hearings that anti-abortion protesters impeded access to the clinics by blocking entrances and surrounding arriving cars, intimidated and harassed arriving patients, and even assaulted patients and staff. J.A. 12–24. One witness described how "patients and their escorts are subjected to a barrage of harassment, usually verbal and sometimes physical," and reported an incident at one clinic where "three protesters stood across the entrance with less than one foot between them. [A clinic employee] was forced to squeeze between them to gain entrance to the clinic." J.A. 15–17. Another clinic staff member testified that a protester pushed her into a moving car driving into the clinic's garage entrance. C.A.App. 200.[4] A patient harassment incident report submitted to the legislative committee detailed how protesters blocked the

[4] "C.A.App." refers to the Joint Appendix filed in the First Circuit.

doorway of a clinic as the patient approached and made physical contact with the patient. J.A. 23–24.

Seven years later, the Massachusetts legislature held another set of hearings prompted by concerns that the existing floating buffer zone was not adequately protecting clinic patients and staff against harassment and intimidation. *See, e.g.*, J.A. 75–76. The evidence showed that protesters continued to crowd entrances to clinics, impede access, and harass clinic patients and staff, despite the 2000 law. J.A. 36, 41–63, 67–89. Witnesses testified that the floating buffer zone was "vague" and "difficult to enforce," resulting in frequent violations of the law but few arrests and prosecutions. *Id.* An employee of one clinic testified that since enactment of the floating buffer zone statute, "[t]he protesters are moving closer and closer to the main door [of the clinic]. They scream and block the way for the patients to get into the clinic. . . ." J.A. 44. A Boston police captain testified that the floating buffer zone statute was "very difficult for us to enforce" and that protesters continued to stand directly in front of the clinic door and "a lot of them go right up in the faces of patients entering the premises." J.A. 67–68.

In response to this testimony, the legislature in 2007 replaced the floating 6-foot buffer with the fixed 35-foot buffer in effect today. Shortly after enactment of the new statute, the Massachusetts Attorney General's office sent letters to reproductive health care facilities and law enforcement agencies in the state interpreting the law to prohibit persons permitted to enter the 35-foot zones (such as clinic employees) from "express[ing] their views about

abortion or . . . engag[ing] in any other partisan speech within the buffer zone." J.A. 90–94.

Petitioners, who describe themselves as "sidewalk counselors," brought suit soon after the new statute went into effect, complaining that its 35-foot buffer violated their First Amendment right to engage in peaceful protest and communication on the public streets. In two sets of opinions, the district court and the First Circuit denied Petitioners' request for declaratory and injunctive relief. Addressing Petitioners' facial challenge, the First Circuit held in 2009 that the statute is content-neutral. Then, applying intermediate scrutiny, the court ruled that the statute represents a narrowly tailored response to the state's significant interest in safeguarding public safety that leaves protestors with ample alternative channels for communication. The court also rejected overbreadth and vagueness challenges. *See* Pet. App. 93a–118a.

In a 2013 opinion, the First Circuit rejected Petitioners' as-applied challenge to the statute. The court concluded that application of the statute to protesters at reproductive health care facilities in Boston, Worcester, and Springfield, Massachusetts survives First Amendment challenge because the buffer zones leave open adequate alternative means of communication at those sites. *See* Pet. App. 1a–28a.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the Massachusetts buffer zone statute is constitutional on its face, but in addressing Petitioners' as-applied challenge, the court gave

insufficient weight to the adequacy of alternative means of communication at two Massachusetts clinics: one in Worcester and one in Springfield. This Court should remand the case so that the court below may more fully assess the availability of alternative avenues of communication in light of the particular record of obstruction of abortion clinic entrances developed in this case.

1. As this Court has repeatedly held, the public streets are "quintessential public forums" for expressive activity. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also United States v. Grace*, 461 U.S. 171, 177 (1983). Indeed, long before public forum doctrine developed as an analytical tool in First Amendment cases, this Court famously observed that public streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515.

Thus, this Court has always reacted with skepticism to restrictions on speech in a public forum where anyone who does not want to hear the speaker's message is free to walk away. *See Cohen v. California*, 403 U.S. 15, 21 (1971) ("we are often 'captives' outside the sanctuary of the home and subject to objectionable speech") (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970)); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–211 (1975).

At the same time, this Court has recognized that the need to protect competing rights may justify some restrictions on speech, even on the public

sidewalks, so long as the restrictions are not aimed at the suppression of ideas and do not suppress substantially more speech than necessary. For example, in *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld a state statute prohibiting electioneering within 100 feet of the entrance to a polling place, reasoning that the measure served compelling state interests in protecting the right to vote freely for the candidate of one's choice and in ensuring the integrity and reliability of elections. *Id.* at 198–99, 206. Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a restriction on "focused picketing taking place solely in front of a particular residence" as serving the state's interest in "[p]reserving the sanctity of the home" and protecting "residential privacy." *Id.* at 483–84 (alteration in original) (internal quotation marks omitted).

2. Inevitably, therefore, this Court must engage in a delicate balancing process. That process begins with determining the appropriate level of scrutiny. We agree with both courts below that intermediate scrutiny is appropriate on these facts. Neither the language of the statute nor its legislative history supports the claim that the statute was enacted to suppress particular ideas or to inhibit discussion of particular subjects. Outside the 35-foot buffer zone, both anti-choice protestors and pro-choice advocates are free to disseminate their message in whatever manner they choose. The statute places no limit on what they can say or how they can say it. Inside the buffer zone, the statute does create an asymmetry by allowing access for clinic patients, employees and agents that is denied to clinic protestors. The clinics could not function

otherwise. But that privileged access does not create a privileged forum for their abortion-related message, according to an authoritative interpretation by the Massachusetts Attorney General.

3. Applying intermediate scrutiny, the Massachusetts statute is constitutional on its face. There can be no doubt that the state has a significant, indeed compelling, interest in preserving the health and safety of clinic patients and staff, and in ensuring that women who exercise their right to end their pregnancies have unimpeded access to abortion services. And, while there is no claim that Petitioners themselves have engaged in violent protest, the state is entitled to consider the broader record of obstruction and violence directed at abortion clinics in Massachusetts and elsewhere when enacting general legislation intended to further those interests.

Under this Court's First Amendment jurisprudence, the question then becomes whether the statute on its face burdens substantially more speech than necessary to further those interests and whether it leaves open ample alternative channels of communication. It is not, in our view, a simple question. By creating a 35-foot buffer zone, the statute necessarily prevents protestors from engaging in face-to-face conversation with clinic patients and staff or from handing them a leaflet just as they are entering the abortion clinic. Precisely because they are up close and personal, those interactions have unique value and have long been recognized as essential elements of protected First Amendment expression. They can, however, take place just outside the buffer zone without violating

the statute, when patients and staff are probably no more than one minute away from the clinic entrance and when the danger of impeding access to the clinic is significantly diminished. Patients and staff who wish to accept a leaflet or engage in conversation with the protestors outside the buffer zone can, of course, do so. And there is no serious dispute that the message of anti-abortion protestors can still be seen and heard even by patients and staff who have entered the 35-foot zone.

Absent a well-known history of obstruction and violence at abortion clinics, we think even this level of intrusion on the First Amendment right to protest might well be unconstitutional. But, given that history and the actual record in this case, we agree with the lower courts that the Massachusetts statute is constitutional on its face.

4. Petitioners' as-applied challenge, on the other hand, should be sent back to the lower courts for a more thorough consideration of the distinction between clinics that are primarily accessed by pedestrians traveling along public sidewalks and clinics that are primarily accessed by cars that enter a driveway and park on private property. In the former instance, protestors can still approach patients and staff in close proximity to the clinic and attempt to initiate a conversation or hand out a leaflet. In the latter instance, that possibility is foreclosed if the buffer zone places protestors 35 feet from the driveway entrance.

This is not to say that a driveway buffer zone can never be constitutional. As in the facial challenge, there are competing equities that must be weighed. Here, the lower courts failed to give

sufficient consideration to either side of the balance. While it is surely true that "the Constitution does not ensure that [a protestor] always will be able to employ her preferred method of communication," Pet. App. 23a, the decision below did not adequately credit the importance of face-to-face communication on the public sidewalks and streets in deciding whether the ability of protestors to chant, pray, and hold up signs as cars pass by is an adequate alternative for communicating their message. And, by asserting that "it is not the buffer zones that constitute the main impediment to communicative activity" at the Worcester and Springfield clinics but the fact that most patients and staff are arriving by car, Pet. App. 24a, the decision below overlooked the impact of the buffer zone on the ability of protestors even to approach cars entering the clinic driveway.

A proper resolution of Petitioners' as-applied challenge requires weighing the loss of that First Amendment opportunity against the history of past obstruction at these and similar sites, the need to maintain traffic safety at those sites, and the effectiveness of other possible law enforcement responses. The factual elements of that assessment can and should best be addressed by the lower courts on remand.[5]

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[5] Amici's position on the issues presented in this case has evolved over time as the legal issues have shifted and the factual record has developed more fully. In 1999, the ACLU of Massachusetts submitted an amicus brief to the Supreme Judicial Court of Massachusetts (SJC) arguing, in response to the Legislature's request for an advisory opinion, that a 25-foot buffer zone outside reproductive health care facilities would be unconstitutional. The SJC unanimously concluded that the proposed buffer zone would not violate either the First

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THAT THE MASSACHUSETTS STATUTE IS CONSTITUTIONAL ON ITS FACE.

A. The Massachusetts Statute Is Properly Subject To Intermediate Scrutiny.

The threshold question in reviewing any restriction on speech is to determine the appropriate

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Amendment or the parallel provisions of the Massachusetts Constitution. *In re Opinion of the Justices to the Senate*, 723 N.E.2d 1205 (Mass. 2000). Despite that ruling, and as noted above, the Legislature in 2000 voted in favor of six-foot floating buffer zones around persons or vehicles within 18 feet of an entrance or driveway to a reproductive health care facility, rather than a 25-foot fixed buffer zone. The 35-foot fixed buffer zone that is now before this Court was adopted in 2007 after another round of legislative hearings. The ACLU of Massachusetts did not testify at those hearings but it did distribute a written statement asserting that an injunction directed against those who violated the law would be a more narrowly tailored response to ongoing obstruction. J.A. 64–66. In 2009, the ACLU of Massachusetts submitted an amicus brief to the First Circuit, which was then considering the facial constitutionality of the current statute. The brief did not take a position on the ultimate constitutional issue but urged the Court to carefully consider the importance of face-to-face interactions in deciding whether the 35-foot buffer zone leaves protestors with ample alternative means of communication. The brief also cautioned against an opinion that would invite overreliance on exclusionary zones and demonstration areas. This brief similarly emphasizes the importance of weighing the competing constitutional interests through a close examination of the factual record.

level of judicial scrutiny. Statutes that distinguish on the basis of content or viewpoint will be upheld only if they are narrowly tailored to advance a compelling interest. Strict scrutiny is appropriate in these circumstances because of the risk that the government is using its authority to suppress unpopular views. Content-neutral statutes do not present that same risk and are thus subject to intermediate scrutiny. Even applying intermediate scrutiny, however, the government must show that it is not burdening substantially more speech than is necessary to further a significant interest, and that it has left open ample alternative avenues of communication.

As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Judged by that standard, the Massachusetts statute is content-neutral.

Prior to enacting the statute, the legislature heard testimony detailing a history of harassment, intimidation, and obstruction of patients and staff seeking to enter Massachusetts clinics. Nothing on the face of the statute expressly refers to the content of any communication, and nothing on the face of the statute singles out speech "against" abortion as a particular concern. *Hill v. Colorado*, 530 U.S. 703, 768–70 (2000) (Kennedy, J., dissenting).[6]

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[6] The statute in *Hill* made it a crime to "knowingly approach" closer than 8 feet to someone walking within 100 feet of the entrance to a health care facility if the purpose of the approach

By prohibiting entering or remaining within a 35-foot buffer zone that the statute creates around abortion clinics, its operative language is directed at behavior, not speech. Likewise, the four exceptions to the general prohibition that appear on the face of the statute, *see* p.3, *supra*, make no reference to expressive activities.

Because one of those exceptions applies to clinic employees and agents, Petitioners argue that the statute favors the speech of pro-choice advocates over the speech of anti-choice protestors. That argument proves too much. First, the statute could not have been written without an exception for clinic employees and agents if the clinics are to remain open and functioning. Second, the Massachusetts Attorney General has construed the statute to prohibit clinic employees and agents within the buffer zone from "express[ing] their views about abortion."[7] J.A. 93.

It is abundantly clear that the Attorney General's interpretation was designed to ensure

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was to engage in "oral protest, education, or counseling," without consent. The ACLU submitted an amicus brief in *Hill* arguing that the statute was content-based because it specifically identified prohibited categories of speech. This Court disagreed.

[7] "[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (first alteration added) (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)). *Accord Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

viewpoint-neutrality and not to suppress unpopular ideas. Protestors and clinic staff are therefore in an equivalent First Amendment position under the statute. Neither may express their views about abortion inside the buffer zone; both may freely do so outside the buffer zone.

It is, of course, true that a content-neutral statute can be selectively enforced. Such selective enforcement would raise serious First Amendment concerns, but those concerns would not be attributable to the statute itself on a facial challenge. To the extent Petitioners complain that clinic escorts are improperly expressing opinions about abortion while standing in or walking through the buffer zones, both courts below held that Petitioners failed to plead sufficient facts to allege that police enforced the statute in a viewpoint-discriminatory way. Pet. App. 14a–17a, 85a–86a.

Petitioners note that the buffer zone in *Hill* applied to all health care facilities while the buffer zone in this case applies only to reproductive health care facilities as evidence that the Massachusetts statute is content-based. Pet.Br. 23–24. The First Amendment does not require the legislature to adopt a regulation on speech that applies everywhere if the problem it is addressing is more acute in some places than others, *see* n.8, *infra*, so long as its interests are unrelated to the suppression of ideas. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (partially upholding statutory restriction on picketing outside foreign embassies because of unique security problems). Petitioners' reliance on *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), is also misplaced. Pet.Br. 24. Amici agree that a law can be content-based in

purpose and effect even if the language of the statute does not expressly draw content-based distinctions on speech. On its face, however, this law does not run afoul of that principle for the reasons stated above.

B. The Massachusetts Statute Is A Facially Valid Time, Place, And Manner Regulation.

As a content-neutral time, place, and manner regulation, the 35-foot buffer zone must be narrowly tailored to advance a significant governmental interest and must leave open ample alternative avenues of communication. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The narrow tailoring requirement of intermediate scrutiny does not require the state to pursue its goals through the least restrictive alternative. But, a statute that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored. *Ward*, 491 U.S. at 799.

In this case, the state's purposes are openly declared in the preamble to the predecessor statute enacted in 2000. It states, in its entirety:

> The purpose of this act is to:—
>
> (a) increase the public safety in and around reproductive health care facilities;
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> (b) maintain the flow of traffic and prevent congestion around reproductive health care facilities;

> (c) enact reasonable time, place and manner restrictions to reconcile and protect both the first amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm; and
>
> (d) create an environment in and around reproductive health care facilities which is conducive to safe and effective medical services, including surgical procedures, for patients.

2000 Mass. Acts 1030, 2000 Mass. Legis. Serv. Ch. 217 (West).

This Court has repeatedly acknowledged the importance of those interests. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 767–68 (1994)) (recognizing state's legitimate interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); *Hill*, 530 U.S. at 715–16 (recognizing state's legitimate interest in facilitating "unimpeded access to health care facilities" and recognizing that "'[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests'" (alteration in original)).

Enactment of the Massachusetts statute followed incidents of violence and harassment at clinics in the state, including blockades of clinic entrances, intimidation of staff and patients, and the murder of two clinic employees. J.A. 12–24.[8] While the 2007 statute did not include a separate preamble, proponents of the bill reiterated the original purposes of the law at the hearing on the 35-foot buffer proposal. *See, e.g.*, J.A. 74–76, 81. These purposes do not evince hostility to anti-abortion protesters' message and, in fact, at the 2007 hearing legislators repeatedly remarked on the importance of safeguarding protesters' ability to communicate their message. *See, e.g.*, J.A. 74–76.

The 35-foot buffer zone clearly advances the law's stated purposes while leaving abortion protestors with significant opportunities to convey their message to persons entering and leaving an abortion clinic. Outside the 35-foot buffer zone, Petitioners' speech activities are unrestricted in any

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[8] This record explains the state legislature's decision to single out abortion clinics for special protection. It is not a problem unique to Massachusetts. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (city can consider the experience of other jurisdictions in assessing the need for a time, place, and manner regulation). Over the last 35 years, clinics across the nation have been subject to more than 200 arsons and bombings, more than 600 anthrax threats, and many more obstructions, including protestors who have chained themselves to doors. Nat'l Abortion Federation, NAF Violence and Disruption Statistics (2011), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2011.pdf (last visited Sept. 12, 2013); *see also, e.g., United States v. Unterburger*, 97 F.3d 1413, 1415 (11th Cir. 1996) (upholding conviction under FACE Act of protesters who chained themselves to clinic door).

way by the statute. They may chant, pray, carry signs or hold a silent vigil within easy sight and sound of their target audience.

It is nonetheless true, as Petitioners argue, that even a 35-foot buffer zone carries a First Amendment cost. Most significantly, Petitioners may not approach clinic patients or staff within the buffer zone in the hope of engaging them in a face-to-face conversation or handing them a leaflet. Those rights matter. This Court has described leafleting as "the essence of First Amendment expression," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). That is true generally, and it is true with regard to the ongoing public debate about abortion. As this Court observed in *Schenck*, "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." 519 U.S. at 377. *See also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 769 (1994); *United States v. Grace*, 461 U.S. 171, 176–77 (1983); *Schneider v. State of New Jersey (Town of Irvington)*, 308 U.S. 147, 162–63 (1939).

Similarly, this Court has recognized the importance of safeguarding the opportunity to engage in face-to-face communication with willing listeners on public sidewalks. *Hill*, 530 U.S. at 726–27 (noting approvingly that the buffer zone at issue "allows the speaker to communicate at a 'normal conversational distance'"); *Schenck*, 519 U.S. at 377 (striking down floating buffer zone around people and vehicles entering clinic in part because it prevented the petitioners "from communicating a

message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks").

Engaging with a passerby at close range and in conversational tones creates a qualitatively different—and often more effective—interaction than shouting or chanting at that passerby across a distance. *See* J.A. 133, 161–62, 179, 201, 216, 248. Although an unwilling listener need not stop to converse with or even listen to the protester, the First Amendment generally requires that protesters on a public sidewalk be given an opportunity to initiate conversation.

This would be a very different case, therefore, if the Massachusetts statute, by its very terms, eliminated any meaningful opportunity for abortion protestors to engage in conversation with people entering or leaving an abortion clinic, or to hand them a leaflet. It does not. And the difference between exercising that opportunity at the clinic's doorstep or 35 feet away is not readily apparent. That distance does not inherently prevent protestors from identifying their target audience. It does not suffer from vagueness that might chill speech that the statute was not even intended to cover. *See Schenck*, 519 U.S. at 378. Nor does it shield persons on the public street in a protective bubble that enables them to "avoid unpopular speech in a public forum." *Hill*, 530 U.S. at 771 (Kennedy, J., dissenting).

This would also be a different case if there were not competing constitutional rights on the other side of the scale, but there are. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 851 (1992)

(the right to obtain an abortion is "central to the liberty protected by the Fourteenth Amendment"); *see also Burson v. Freeman*, 504 U.S. 191 (1992) (upholding restriction on electioneering outside polling places); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 128 (1991) (Kennedy, J., concurring) (noting that one of the "questions we cannot avoid" deciding in First Amendment cases is "whether some other constitutional right is impaired").

Of course, this is not the first time that the Court has been asked to balance the rights of abortion protestors with the rights of women seeking an abortion. It has upheld some protest restrictions, including a prohibition on knowingly approaching within eight feet of a patient absent consent in *Hill*, 530 U.S. at 726–30, a 15-foot fixed buffer around entrances in *Schenck*, 519 U.S. at 380–85, and a 36-foot fixed buffer as applied to a clinic's entrances and parking lot in *Madsen*, 512 U.S. at 768–71. It has struck down others, including a 15-foot floating buffer around people and vehicles entering a clinic in *Schenck*, 519 U.S. at 377–80, and a ban on "uninvited" approaches within 300 feet in *Madsen*, 512 U.S. at 773–74.

The 35-foot buffer zone that has been challenged in this case not only allows more speech than restrictions that this Court has struck down, it allows more speech than restrictions that this Court has upheld. In particular, it offers a greater opportunity for face-to-face interaction than the

floating buffer in *Hill* and at least as much speech as the fixed buffer in *Madsen*.[9]

Viewed in this context, and given the record of obstruction, harassment, and violence at Massachusetts abortion clinics over many years, the First Circuit correctly concluded that the Massachusetts statute does not violate the First Amendment on its face.

II. PETITIONERS' AS-APPLIED CHALLENGE SHOULD BE REMANDED FOR FULLER CONSIDERATION AND, IF NECESSARY, FURTHER FACTFINDING REGARDING THE WORCESTER AND SPRINGFIELD FACILITIES.

Three reproductive health care facilities, located in Boston, Worcester, and Springfield, Massachusetts, are at issue in Petitioners' as-applied challenge. The court below concluded that adequate alternative channels of communication remain available to Petitioners at all three clinics, but its cursory analysis failed to account for the importance of ensuring an opportunity to initiate face-to-face interaction or distribute literature at clinics where

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[9] The buffers in *Madsen* and *Schenck* were imposed by injunction rather than statute. They were therefore directed against specific defendants who had engaged in prior misconduct. One might have concluded that the targeted nature of an injunction action reduced the risk to First Amendment values. This Court reached the opposite conclusion, holding that the fact that injunctions do not have universal application eliminates an important safeguard against overreaching and requires "a somewhat more stringent application of general First Amendment principles." 512 U.S. at 765.

most patients enter by car, or to assess whether record evidence of obstruction of clinic driveways justifies the restriction.

The layouts of the three clinics are important to assessing the as-applied challenges.[10] The Boston clinic occupies a free-standing building on Commonwealth Avenue in the Brighton section of Boston. The buffer zone, marked by a painted arc, covers all but a small sliver of the sidewalk in front of the entrance and, in one direction, extends several feet around the corner of the building onto the sidewalk bordering a side street. As drawn, this buffer zone extends less than 35 feet in any direction from the front entrance: approximately 22 feet from the entrance to the easternmost edge of the arc, 26 feet to the westernmost edge, and 25 feet to the southernmost edge.[11] A second buffer zone with a 35-foot radius surrounds a rear garage entrance on a side street. J.A. 293–94.

The Worcester clinic also occupies its own free-standing building. More than 85 percent of patients arrive by car, turning from Dewey Street into a private parking lot adjacent to the building and entering through a back entrance on private property. Patients arriving on foot enter through the main entrance via a private walkway, which extends 54 feet from the nearest public sidewalk on Pleasant Street. Painted arcs with radii of approximately 35 feet surround the points where the front walkway

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[10] The buffer zones at each site can most easily be observed using Google maps.

[11] The painted buffer is thus smaller than the statutorily authorized zone.

and the parking lot driveway intersect with the public sidewalks. At the front entrance, the arc extends across most of the public street, and covers the public sidewalk to the left and right of the clinic entrance. At the driveway entrance, the arc extends across the entire public street and several feet into the sidewalk across the street. J.A. 295–96.

The Springfield clinic is located in a multi-tenant commercial building housing seven other medical offices. The building is set back from the adjacent streets by approximately 316 and 206 feet, and is surrounded on three sides by private parking lots and another building, with the fourth side abutting unused land running along a railroad track. Approximately 90 percent of patients arrive by car and park in one of the private lots adjacent to the clinic. There are five driveways by which patients can enter the parking lots bordering the clinic, two of which are surrounded by painted and posted arcs with radii of 35 feet.[12] Patients arriving on foot must walk through or next to the parking lots to reach the building entrance. J.A. 297–99.

In contrast to the clinics in Worcester and Springfield, "all prospective patients" at the Boston clinic "must traverse a public sidewalk to gain entry." Pet. App. 24a. Because all patients arrive at the Boston clinic on foot via public sidewalks, Petitioners can communicate their message through any means, including face-to-face discussions and leafleting,

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[12] The other three driveway entrances are also surrounded by painted arcs, but are not posted with signs as required by the statute. Those buffer zones therefore "have no legal effect." Pet. App. 8a–9a.

before the patients cross into the buffer zone. Other means of communication, such as holding signs, chanting, and praying, can be seen and heard by patients when they are both inside and outside of the buffer zone.

Petitioners' concern that they cannot continue their face-to-face sidewalk counseling efforts up to the front door of the clinic, as they desire, is certainly relevant to the analysis. But on this factual record, including the history of obstruction of entrances to clinics in Boston and elsewhere in the state, Massachusetts's content-neutral time, place, and manner regulation leaves ample alternative means of communication at the Boston clinic.

The First Circuit's analysis with respect to the Worcester and Springfield clinics is more problematic. The court wrote:

> The analysis is somewhat different with respect to Worcester and Springfield. At these sites, it is not the buffer zones that constitute the main impediment to communicative activity; instead, it is the prospective patients' unwillingness to venture off the clinics' private property. Most prospective patients arrive by car, park in private lots, and use non-public walkways to enter the facility. The fact that these patients are not readily accessible to the plaintiffs is more a function of the physical characteristics of the sites than of the operation of the Act.

> This is a critically important datum. The law does not require that a patient run a public-sidewalk gauntlet before entering an abortion clinic. That patients choose to stay on private property or not to stop their cars on approach is a matter of patient volition, not an invidious effect of the Act. First Amendment rights do not guarantee to the plaintiffs (or anyone else, for that matter) an interested, attentive, and receptive audience, available at close-range.

Pet. App. 24a.

The court of appeals is plainly correct that the First Amendment does not require unwilling listeners to leave private property to engage more closely with protesters, but that observation does not adequately address whether the 35-foot buffer zone leaves open sufficient alternative means of communication. Petitioners do not seek to enter private property to engage in protest activities, nor would striking down the statute permit them to do so. Rather, they seek to be able to stand on public sidewalks, at the driveway entrances to the private parking lots of the Worcester and Springfield clinics, in order to attempt to speak with and provide literature to drivers and passengers of cars entering those driveways. J.A. 200, 219, 245, 254. Petitioners complain that when they must stand 35 feet from the driveway entrances, they are unable to effectively converse with or offer literature to patients and others arriving by car. J.A. 200, 218–19, 245, 253.

The court below concluded that "adequate communicative channels remain available to the plaintiffs, including oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups." Pet. App. 26a. But the court appears to have ignored the practical effect of the statute on Petitioners' ability to converse with or proffer literature to people approaching the Worcester and Springfield clinics. Because 85 to 90 percent of patients enter those clinics' private parking lots by car, Petitioners have a realistic opportunity to initiate conversation with, or distribute literature to, only the small proportion of patients entering the buffer zones on foot.

As explained above, *see* Point I, *supra*, leafleting and engaging in face-to-face communication on public sidewalks are "classic forms of speech that lie at the heart of the First Amendment." *Schenck*, 519 U.S. at 377. Petitioners' opportunity to converse with or offer literature to persons approaching the clinics is thus an important factor in assessing whether adequate means of communication remain available. For the majority of patients arriving by car, Petitioners' opportunity to converse or distribute literature is sharply circumscribed. Were they able to stand on the public sidewalk near the driveway's edge, Petitioners might at least attempt to engage with vehicle occupants as they turned into the parking lots.

The court of appeals failed adequately to consider that possibility in evaluating Petitioners' as-applied challenge. *See Burson v. Freeman*, 504 U.S.

at 210 n.13 (claim that 100-foot ban on electioneering activity may place some protestors across a highway at some polling places should be addressed in an as-applied challenge). That failure is significant and justifies a remand for fuller consideration of the record and, if necessary, further fact-finding.

As the burden on Petitioner's First Amendment rights grows, the burden on the state to justify restrictions on those rights grows correspondingly. If Petitioners are left with ample alternative avenues of communication, the injury to their First Amendment rights is minimal. If Petitioners' ability to deliver their message is substantially diminished because the opportunity to engage in face-to-face communication and leafleting is essentially foreclosed, then a more searching inquiry is required.

Here, there is evidence in the record that clinic driveways as well as doorways have been blocked in the past, evidence that can and should appropriately factor into the analysis of whether the statute is constitutional as applied to Worcester and Springfield. *See, e.g.*, J.A. 18 (Testimony of Karen Caponi, Clinic Director, Planned Parenthood of Worcester, April 15, 1999) ("Our facility has a driveway into our parking lot, which has been the site of repeated problems with protesters."). But the frequency with which this problem occurred is also relevant in weighing the constitutionality of the measure as applied. The court of appeals never engaged in that inquiry because it did not treat the intrusion on Petitioners' First Amendment right to engage in face-to-face communication as significant.

In addition, the court of appeals should consider on remand whether the police could reasonably have used other available means at their disposable to ensure both access to the Worcester and Springfield clinics and the ability of protestors to adequately communicate their message.[13] While there was evidence in the record relating to the practical difficulties of enforcing the floating buffer zone adopted in 2000, *see* J.A. 67–68 (Testimony of William Evans, Captain, Boston Police Department, May 16, 2007) (noting inherent ambiguity of no-approach rule); J.A. 70, 76–79 (Testimony of Martha Coakley, Attorney General, May 16, 2007) (same), the court of appeals never considered whether those or other enforcement problems are relevant to maintaining the safety and security of clinic driveways. *See Madsen*, 512 U.S. at 769 ("The state court seems to have had few other options to protect access given the narrow confines around the clinic."). This consideration should also be part of the analysis on remand.[14]

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[13] *See* Mass. Gen. Laws ch. 266, § 120E ("Whoever knowingly obstructs entry to or departure from any medical facility . . . after notice to refrain from such obstruction or interference, shall be punished [with criminal or civil sanctions]."); *id.* § 120E 1/2(e) ("Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished . . . . A person who knowingly violates this section may be arrested without a warrant . . ."). In addition, general traffic safety laws may apply in this circumstance, and trespass laws may come into play if protestors enter upon private property.

[14] While the location of some clinics may present idiosyncratic issues that need to be addressed separately, this balancing of interests can generally proceed in a more categorical fashion that eliminates the need to litigate the constitutionality of the

Accordingly, Petitioners' as-applied challenge should be remanded with instructions for the court below to address these factors based on the record before it (or to remand to the district court for further factfinding, if necessary). The statute may still be upheld as applied to the driveway entrances given an adequate showing in the record, but the First Circuit's treatment of this issue so far is insufficient to support its conclusion.

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statute as applied to every clinic. For example, the problems presented by driveway entrances—both for those seeking access to the clinic and for those seeking to protest—will often be the same. In balancing these competing interests, similarly configured clinics can be treated similarly.

CONCLUSION

The judgment of the Court of Appeals that the Massachusetts statute is constitutional on its face should be upheld. The judgment that that statute is constitutional as applied should be vacated and remanded for further proceedings.

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AMICUS CURIAE BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,
Respondents.

On a Writ of Certiorari To the United States Court of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AND MASSACHUSETTS MEDICAL SOCIETY IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are private, voluntary, nonprofit organizations of physicians dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American College of Obstetricians and Gynecologists (ACOG) has been the nation's leading group of professionals providing health care to women for more than 60 years; its more than 55,000 members represent over 90 percent of American board-certified obstetricians and gynecologists.

Amicus the American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Massachusetts.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.3, petitioners and respondents have consented to the filing of this *amici curiae* brief in letters enclosed with this brief.

American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Amicus Massachusetts Medical Society (MMS) was founded in 1781 as a statewide professional association committed to advancing medical knowledge, developing and maintaining the highest professional and ethical standards of medical practice and health care, and promoting medical institutions. MMS is the oldest continuously operating medical society in the United States; its nearly 25,000 members include physicians practicing in all areas of medicine throughout the Commonwealth.

The Massachusetts statute regulates conduct that has an immediate and evident effect on the health and welfare of patients treated at reproductive health care facilities by members of ACOG, AMA, and MMS (collectively, the "medical associations") and other physicians. Similarly, the conduct regulated by the statute directly and adversely affects the ability of physicians and other medical providers to treat their patients. As associations of physicians, including physicians who provide reproductive health care in Massachusetts, the medical associations have a direct interest in ensuring that women have safe, unhindered access to essential reproductive health and other medical services. Moreover, the medical associations can offer knowledge of the conditions and circumstances of providing health care that will be useful to the Court's analysis.

SUMMARY OF ARGUMENT

This case calls on the Court to decide whether the challenged Massachusetts statute, Mass. Gen. Laws ch. 266, § 120E½(b) (the "Act"), is a permissible time-place-manner regulation. The Court must accordingly assess whether the statute is "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant government interest," and "leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted). The medical associations agree with respondents that the statute fully satisfies each of these criteria.

The Massachusetts legislature determined, after hearing extensive testimony documenting years of experiences by patients, clinicians, and law enforcement, that the fixed buffer zone provided for in the challenged statute was necessary to ensure safe, unhindered access to reproductive health facilities in that state. *See* Resp. Br. 1-14. As the testimony before the legislature showed, police and others could not, as a "practical matter," preserve access to reproductive health clinics by other means—through the state's previous floating buffer zone law, which had proved essentially unenforceable; through the use of targeted injunctions; or through more general criminal laws against assault, disturbing the peace, and the like. J.A. 12, 16-18, 20-22, 67-70, 77-79, 122-23; *see also* Resp. Br. 3-10 (summarizing evidence). While the State had attempted each of those measures, each had failed. In the legislature's judgment, a different form of protection was "necessary for the immediate

preservation of the public safety." Mass. St. 2007, c. 155. Accordingly, in 2007, the Massachusetts legislature enacted the challenged law in an effort to "increase forthwith public safety at reproductive health care facilities." *Id.*

There can be no doubt that the protection of public health and safety is a compelling interest that States are uniquely situated to advance. Indeed, promotion of health and safety "is unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). Notably, petitioners make no effort to dispute that the interests the Massachusetts legislature sought to serve through the challenged Act are compelling. *See* Pet. Br. 35, 45.

Instead, petitioners and their *amici* argue that the Act advances those concededly "legitimate" state interests improperly. Pet. Br. 45. In particular, petitioners and their *amici* contend that the Act is not content-neutral because it applies only to stand-alone reproductive health facilities, while the important state interests that the law was enacted to serve apply, in petitioners' view, to patients at all types of healthcare facilities and to "every building in the State that hosts any activity that might occasion protest or comment." *Id.* at 21-27; *see also* Bioethics Defense Fund Br. 7, 9, 11, 13, 17; Democrats for Life Br. 17; Eagle Forum Br. 4-5. Petitioners further argue that the Act is not narrowly tailored because, according to petitioners, "the interests in public safety and access are already amply served by" other, generally applicable state and federal laws. Pet. Br. 36. Finally, although petitioners have not argued as much, their *amici* contend that the Act actually undermines the state interest in health and safety

because, according to *amici*, it limits patients' ability to obtain supposedly relevant information from protesters, and "there is no other source of neutral information about abortion readily available to women who visit reproductive health facilities in Massachusetts." Women Who Attest Br. 21; *see also* Bioethics Defense Fund Br. 18.

Contrary to these arguments, the Act not only is content-neutral, but also is narrowly tailored to promote—and does effectively promote—the fundamental State interest in public health and safety. The challenged statute was enacted to address a problem that is unique to the areas outside the entrances to reproductive health care facilities. Moreover, as the medical associations show below, the numerous institutional obstacles to obtaining reproductive health services, and the unparalleled importance of receiving such services without delay, further justify the State's decision to focus the law's protections on reproductive health facilities in order to serve the significant government interest in ensuring women's unencumbered and safe access to vital health care.

The reproductive health clinics that are the subject of the challenged statute provide a wide array of essential health services to thousands of women every year. Access to such services is, for many women, already limited by distance, cost, and other factors—and encountering harassment when entering clinics imposes yet another barrier that restricts women's ability to obtain needed health services promptly and safely. Yet delay in seeking reproductive health services leads to significantly worse patient outcomes. In particular, induced abortion is safest when provided early in pregnancy. Other reproductive health care is likewise most effective when delivered promptly. Accordingly, ensuring that

women are able to access such services as promptly as possible is uniquely important in this context. Moreover, experiencing the type of stress that protesters' harassment causes just before a procedure increases the risk of adverse results. The Act's focus on ensuring that women are not compelled to delay or even forgo reproductive health care, and ensuring that they are not harassed or intimidated immediately before undergoing medical procedures, is narrowly tailored to advance this essential state interest.

Furthermore, the contention of petitioners and their *amici* that the Act undermines health and safety by preventing petitioners and others from providing supposedly essential information to patients entering reproductive health care facilities—in particular, information that patients supposedly will not otherwise receive—is simply mistaken. The medical professionals who provide induced abortions and other reproductive health services have ethical and legal obligations to ensure that their patients give fully and accurately informed consent before any procedure is performed. Clinicians thus provide accurate, comprehensive information regarding the medical risks and benefits of induced abortion, and other reproductive health care, as well as information about alternatives. Moreover, much of the information that petitioners' *amici* suggest is provided to women only by protesters is in fact medically inaccurate and highly misleading. There is thus no basis for overturning the statute on the ground that it will ensure the availability of such information to women seeking reproductive health care.

Because the challenged law enables respondents to ensure safe access, unhindered by harassment, to reproductive health care facilities, and thus enables

medical providers to offer timely treatment, as well as comprehensive, accurate, and relevant medical information, the statute should be upheld and the decision below affirmed. As noted above, the interests at stake here are "unquestionably at the core" of the Massachusetts legislature's power to protect Massachusetts citizens. *Kelley*, 425 U.S. at 247. For that reason, this Court has traditionally granted States "'great latitude ... to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). This case should be no different. The legislative judgment encapsulated in the Act should not be disturbed.

ARGUMENT

I. THE ACT IS CONTENT-NEUTRAL AND NARROWLY TAILORED TO PROMOTE THE IMPORTANT STATE INTEREST IN PUBLIC HEALTH AND SAFETY.

A. The Reproductive Health Facilities At Issue Provide Essential Services That Many Women Struggle To Access.

The reproductive health facilities subject to the Act's protections play an essential and unique role in promoting women's health. The facilities at issue in this case provide a wide range of medical services to tens of thousands of patients every year, including breast and cervical cancer screening, infertility services, family planning, screening and treatment for sexually transmitted infections, abortions, and full gynecological services. J.A. 14, 18, 61, 77. More than two-thirds of patient visits are for preventative

health care.[2] J.A. 61, 77. The services provided by these reproductive health care facilities are essential to women's health and welfare.

For many women, the physicians and other medical providers who offer essential services at reproductive health care facilities act as the patient's primary—and sometimes only—connection to medical care.[3] This is particularly true for women who lack insurance. Among the uninsured, fully half of women visiting reproductive health clinics used the clinic as their only source of medical care. Frost, *Specialized Family Planning Clinics, supra.*

However, many women struggle to access reproductive health care facilities for a number of reasons.[4] Nationally, many women must travel

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[2] In 2011, the latest year for which data is available, Planned Parenthood Affiliate Health Centers provided nearly 11 million medical services for nearly three million people. *2011-2012 Annual Report on Planned Parenthood Federation of America and Related Organizations* 4-5, *available at* http://issuu.com/actionfund/docs/ppfa_ar_2012_121812_vf/1 (last visited Nov. 20, 2013). Of the many, essential health services provided by Planned Parenthood Affiliate Health Centers, only 3 percent of those services were abortions. *Id.*

[3] Jennifer J. Frost et al., *Specialized Family Planning Clinics in the United States: Why Women Choose Them and Their Role in Meeting Women's Health Care Needs*, 22 Women's Health Issues e519 (2012); *see also, e.g.*, Jennifer J. Frost, *U.S. Women's Use of Sexual and Reproductive Health Services: Trends, Sources of Care and Factors Associated with Use, 1995-2010*, at 32 (May 2013), *available at* http://www.guttmacher.org/pubs/sources-of-care-2013.pdf ("In 2006-2010, a majority (63%) of women who visited a publicly funded clinic for one or more family planning services in the prior year reported that the clinic was their usual source for medical care.").

[4] *See, e.g.*, Christine Dehlendorf & Tracy Weitz, *Access to Abortion Services: A Neglected Health Disparity*, 22 J. Health

significant distances to access reproductive health services—and particularly induced abortion. In 2008, 87% of counties lacked a reproductive health care facility that provided induced abortions, and 35% of women aged 15-44 lived in those counties.[5] The number of abortion providers has been steadily declining since 1982. Jones & Kooistra, *supra*, at 41. Ninety-seven percent of all nonmetropolitan counties have no abortion services.[6] Nonhospital abortion providers estimate that 19% of their patients travel 50-100 miles, and 8% travel more than 100 miles.[7]

The need to travel long distances leads to delay in obtaining services.[8] The difficulty in accessing abortion providers is particularly problematic for vulnerable populations. *See* Dehlendorf & Weitz, *supra*, at 417 ("The effect of limited access to abortion services results in significant consequences for some

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Care Poor Underserv. 415, 416 (2011) (explaining that poor and minority women experience significant barriers to accessing needed reproductive health services, including travel, time, lack of financial support for abortion care, and lack abortion services); Martin Donohoe, *Increase in Obstacles to Abortion: The American Perspective in 2004*, 60 J. Am. Med. Women's Ass'n 16, 18-22 (2005).

[5] Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 Persp. on Sexual & Reprod. Health 41, 46, 49 (2011).

[6] Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—And the Women They Serve—Pay the Price*, 16 Guttmacher Pol'y Rev. 7, 10 (2013) [hereinafter Gold & Nash, *TRAP Laws*].

[7] ACOG Comm. on Health Care for Underserved Women, Comm. Opinion No. 429, *Health Disparities for Rural Women* 2 (Mar. 2009).

[8] Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstet. Gynecol. 729, 735 (2004).

women, including women in vulnerable populations having abortions at later gestational ages.") (footnote omitted).

Lack of financial support poses another significant barrier to women's access to abortion services.[9] Pursuant to the Hyde Amendment, federal Medicaid and Medicare funds may not be used for an abortion except to preserve a woman's life or in the case of rape or incest, Donohoe, *supra*, at 18, and only seventeen states allow Medicaid funds to be used for medically necessary abortions.[10] Women at all income levels face other significant barriers, such as work

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[9] *See, e.g.*, Rachel K. Jones et al., *At What Cost?: Payment for Abortion Care by U.S. Women*, 23 Women's Health Issues e173 (2013) ("[A]bortion patients are confronted with substantial financial burdens in order to pay for the[ir] procedures," and such financial obstacles "may also influence at what stage in the pregnancy [a woman is] able to" seek an abortion); Donohoe, *supra*, at 18-19 (discussing cost of abortion procedures and lack of insurance coverage as significant barriers to abortion).

[10] Guttmacher Inst., *State Funding of Abortion Under Medicaid, State Policies in Brief* (Oct. 1, 2013), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf; *see also* Jones & Kooistra, *supra*, at 50. Even in states where the state Medicaid program does cover abortion care for poor women, women still encounter obstacles in getting the state to pay for the procedure, because of, for example, difficulties negotiating the application process and difficulty locating a provider who accepts the state Medicaid payment for the necessary procedure; therefore, state funding under Medicaid does not necessarily resolve the significant delays caused by financial barriers to abortion services. *See, e.g.*, Diana Green Foster et al., *Predictors of Delay in Each Step Leading to an Abortion*, 77 Contraception 289, 292 (2008) (discussing factors associated with delay in abortion care based on study of women seeking second-trimester abortions in California); *see also* Jones et al., *supra* (discussing the numerous barriers to funding that exist even in the states where Medicaid does cover abortion services).

and scheduling problems, pressures from partners and family, distance from a provider, gestational limits, and increasing legal constraints on the circumstances under which abortions may be performed.[11]

Protests outside reproductive health care facilities impose an additional constraint on women's access to the critical health care services provided by those clinics. To be sure, some protesters are peaceful and neither harass nor create stress for patients visiting reproductive health facilities. However, the record in this case leaves no doubt that many patients in Massachusetts *did* face harassment when entering clinics before the challenged Act was put in place. *See* Resp. Br. 2-5, 6-12 (summarizing evidence of harassment and intimidation of patients entering reproductive health clinics before the current law was enacted). And the record here is hardly unique. In 2000, 82% of facilities providing 400 or more abortions per year experienced some type of harassment. Jones & Kooistra, *supra*, at 41. In 2008, the percentage of such providers reporting some type of antiabortion harassment increased to 89%, *id.* at 48, and the National Abortion Federal (NAF) reported 12,503 incidents of facility picketing alone.[12] Anti-

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[11] Jones & Kooistra, *supra*, at 47-48; Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 59 (1995);*see also* Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health e1, e3 (published online ahead of print Aug. 15, 2013); Donohoe, *supra*, at 18-22; Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Persp. on Sexual & Reprod. Health 6, 13-14 (2003); Gold & Nash, *TRAP Laws*, *supra*, at 7.

[12] Diana Green Foster et al., *Effect of Abortion Protesters on Women's Emotional Response to Abortion*, 87 Contraception 81, 81 (2013) [hereinafter Foster et al., *Effect of Abortion Protesters*].

abortion violence has increased 21% from 1991 to 2012.[13]

Harassment or hindrances at the entrance to abortion clinics—no matter what the viewpoint of those protesting—has real, clinical consequences for patients. Women who encounter protesters may delay treatment or avoid seeking treatment altogether. *See, e.g.*, Russo et al., *supra*, at 565 ("Patients travel further to receive services in less harassed locations, sometimes delaying their procedures in order to avoid harassment."). That harassment outside reproductive health care facilities causes women to delay, or even forgo, obtaining necessary health services is clear from the evidence in the record. *See* J.A. 41, 51, 88-89 (describing women who delay procedures or opt not to enter facilities in order to avoid facing protesters); *see also id.* at 75 ("[W]ithout unfettered and reasonable access to these health services, ... many women were being intimidated from having those services provided in an appropriate manner."); *infra* Section I.B.

Harassment by protesters outside of reproductive health care facilities reduces women's access to services for the additional reason that harassment by protesters reduces the number of medical professionals willing to work in reproductive health care facilities.[14] In addition to driving experienced medical

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[13] Jennifer A. Russo et al., *Antiabortion Violence in the United States*, 86 Contraception 562, 565 (2012); *see also* J.A. 14-15, 18, 21, 54, 61-62, 68-72, 77-78, 84-88 (describing the frequency of antiabortion activities outside reproductive health care facilities).

[14] *See* Henshaw, *supra*, at 59 (11% of nonhospital providers reported that physician shortages and other staffing problems reduced their ability to provide abortion services); Russo et al., *supra*, at 565; Jones & Kooistra, *supra*, at 49; Deborah Epstein,

providers out of the practice, harassment and intimidation may discourage younger medical providers from entering the field, thereby further reducing the availability of abortion services.[15] Further reductions in the number of reproductive health providers will make access to all forms of reproductive health services all the more costly and burdensome for patients. And, as the record in this case shows, there have been no comparable protest activities—nor any resulting discouragement of providers—outside any other form of health care facility in Massachusetts. *See* Resp. Br. 2 n.1, 29-30.

In sum, harassment at the entrance to reproductive health facilities—regardless of the content of any message sought to be communicated to patients—not only imposes an obstacle to women's ability to access both reproductive and other health care, but also exacerbates other existing constraints on women's access to reproductive health care. Because these access problems are unique to reproductive health facilities, the Act's focus on reproductive health facilities is entirely appropriate.

B. Prompt And Unhindered Access To Reproductive Health Services Is Critical To Promoting Women's Health.

It is incontrovertible that earlier treatment is better for patient health and welfare. Induced abortion is one of the *least* risky procedures in modern medicine. Bartlett et al., *supra*, at 734-36.

Will Violence End Patients' Access to Abortion?, 76 Med. Econ. 51, 52-54 (1999).

[15] David A. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719, 721 (1992); *see also* Jones & Kooistra, *supra*, at 46; Finer & Henshaw, *supra*, at 13-14.

Less than 0.3% of abortion patients in the United States experience a complication that requires hospitalization, and well-accepted statistics show that an induced abortion is far safer than carrying a pregnancy to term and giving birth.[16] However, induced abortion is safest and has the lowest risk of complications when performed early in a pregnancy.[17]

From the medical point of view, once a woman has made the decision to have an abortion, the sooner the procedure is performed the better, as "[the] risk of death increase[s] *exponentially* with increasing gestational age." Bartlett et al., *supra*, at 731 (emphasis added). For each additional week of gestation, there is a 38% increase in risk of death, *id.*, and most abortion-related mortalities could be prevented if women obtained their abortions prior to 8 weeks of pregnancy. Dehlendorf & Weitz, *supra*, at 417. Accordingly, "*there are significant health conse-*

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[16] Gold & Nash, *TRAP Laws*, *supra*, at 7; Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstet. & Gynecol. 215, 215 (2012). The mortality rate for all legal, induced abortions performed from 1998 to 2005 was 0.6 per 100,000 procedures, whereas the mortality rate for live birth during that same time period was 8.8 deaths per 100,000 births—approximately 14 times higher than that associated with abortion. *Id.* at 216; *see also* Bartlett et al., *supra*, at 734 ("In the 25 years following the legalization of abortion in 1973 the risk of death from legal abortion declined dramatically by 85%, from 4.1 to 0.6.") (citation omitted). The risk of dying from a legal abortion in the first trimester—when almost nine in 10 abortions in the United States are performed—is no more than four in a million. Gold & Nash, *TRAP Laws*, *supra*, at 7.

[17] Dehlendorf & Weitz, *supra*, at 417; Gold & Nash, *TRAP Laws*, *supra*, at 7.

quences for delayed access to care."[18] *Id.* (emphasis added).

The importance of prompt access to care is by no means limited to abortion. Other reproductive health services are likewise safer and more effective if delivered promptly. For example, early and regular prenatal care is a well-accepted strategy for improving health outcomes of pregnancy for mothers and infants.[19] Regular screenings for breast cancer and cervical cancer are essential to maximizing the likelihood of detecting the disease early when treatment options are greater and survival rates are significantly improved.[20] Delay resulting from patient

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[18] An unwanted delay between the abortion decision and the abortion procedure can also have adverse health consequences, because such delay is a significant source of distress for many women. Jocelyn A. Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Brit. J. Clin. Psychol. 29, 37 (1982).

[19] *See, e.g.*, Reagan G. Cox et al., *Prenatal Care Utilization in Mississippi: Racial Disparities and Implications for Unfavorable Birth Outcomes*, 15 Matern. Child Health J. 931, 931, 934-36 (2011); Sarah Partridge et al., *Inadequate Prenatal Care Utilization and Risks of Infant Mortality and Poor Birth Outcome: A Retrospective Analysis of 28,729,765 U.S. Deliveries over 8 Years*, 29 Am. J. Perinatol. 787, 789-93 (2012).

[20] *See, e.g.*, ACOG Comm. on Practice Bulletins-Gynecology, ACOG Practice Bulletin No. 122, *Breast Cancer Screening* (Aug. 2011); Lynn A. Gloeckler Ries et al., SEER Survival Monograph, *Cancer Survival Among Adults: U.S. SEER Program, 1988-2011, Patient and Tumor Characteristics* 102-04, 114-16 (2007) (showing significant differences in 5-year relative survival rates for female breast cancer and cervical cancer by stage at time of diagnosis), ACOG Comm. on Practice Bulletins-Gynecology, ACOG Practice Bulletin No. 131, *Screening for Cervical Cancer* (Nov. 2012) ("approximately 60% of diagnoses of cervical cancer are a result of inadequate screening"); Bengt Andrae et al., *Screening and Cervical Cancer Cure: Population Based Cohort Study*, 344 BMJ e900 (Mar. 1, 2012).

or provider fear of encountering harassment outside of reproductive health care facilities causes worse outcomes in each of these situations.

Moreover, an increased likelihood of delay is not the only adverse effect of harassment at the entrance to reproductive health facilities. As the record in this case reflects, the harassment that patients in Massachusetts endured before the challenged law was enacted gave rise to substantial stress for patients. *E.g.*, J.A. 21-22, 41, 51. The stress caused by confronting harassment simply compounds the stress that already exists for patients facing the emotional complexities of an unwanted pregnancy or the need for medical treatment.[21] Research shows that direct physical approaches—*i.e.*, "being stopped by protesters"—increases the risk of stress for patients "compared to seeing protesters only." Foster et al., *Effect of Abortion Protesters*, *supra*, at 86. For patients who are already in a state of emotional vulnerability, harassment in the form of close physical proximity outside a reproductive health care facility can have a profound negative effect on patients' psychological and physiological health.[22]

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[21] *See, e.g.*, Nancy E. Adler et al., *Psychological Factors in Abortion*, 47 Am. Psychologist, 1194, 1197 (1992); *see also, e.g.*, J.A. 86.

[22] *See* Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. Clin. Psychol. 404, 406 (1994) ("anti-abortion demonstrators have a visible adverse impact on women entering picketed clinics," and "some women show obvious signs of psychological stress (including sweating, palpitations, anger, crying, or hyperventilation) after being subjected to anti-abortion demonstrators"); *see also* Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 Population & Env't 379, 380 (1991) (patients who encountered "even

Such stress-related symptoms complicate medical procedures and increase the attendant risks. *See Hern, supra*, at 380. "In general, high preoperative fear or stress is predictive of a variety of poorer outcomes, including greater pain, longer hospital stays, more postoperative complications, and poorer treatment compliance." Janice K. Kiecolt-Glaser et al., *Psychological Influences on Surgical Recovery: Perspectives From Psychoneuroimmunology*, 53 Am. Psychologist 1209, 1214 (1998). If a patient becomes agitated before or during an induced abortion, "she could easily experience serious complications of the abortion that would be extremely unlikely under

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a few picketers .... would enter the clinic's waiting room crying[,] shaking from fear and anger," and demonstrating clear signs of "psychophysiological stress").

Amicus Cato Institute's claim that women seeking abortions are not upset by protesters, Cato Institute Br. 16, is not supported by the sole article it cites, Foster et al., *Effect of Abortion Protesters, supra*, which only considered the continued effects of protesters on women one week after they obtained abortions. *Id.* at 82. The Foster article did not address the emotional impact of protesters on women immediately prior to, or at the time of, the procedure and, more importantly, as the authors explicitly noted, the Foster study did not include women who were so upset by the protesters that they left the facility without receiving the health services they sought to obtain. *Id.* at 86.

That *amicus* Cato Institute's claim is a fallacy is further demonstrated by the accounts of the medical providers who have comforted and counseled patients who arrive at the facilities distraught, scared and even panicked, as a result of their encounters with protesters. *See, e.g.*, J.A. 14 (clinic director describing patients "becom[ing] panicked while attempting to avoid the protesters"); *id.* at 85 (volunteer describing patients being "terrified to even walk into the clinic"); *id.* at 86 (similar).

other circumstances." Hern, *supra*, at 381.[23] Additionally, research has shown that the upsetting experience of encountering harassment from protesters is correlated to increased levels of depression 30 minutes after an abortion; "the more intense the antiabortion activity outside the clinic when a woman tried to enter, the more depressed she was post-abortion."[24]

C. The Challenged Fixed Buffer Zone Protects Patients From The Adverse Effects Of Harassment Without Regard To The Content Of Protesters' Speech.

By protecting patients' safe access, unhindered by harassment, to reproductive health facilities, the Act serves both to reduce the likelihood that patients will delay or forgo treatment, and to reduce the adverse effects on patients from the stress of direct physical confrontation by protesters. Moreover, it does so

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[23] Some of these complications stem from the use of anesthesia. Patients exhibiting signs of heightened anxiety often require higher levels of sedation, and increasing the level of sedation in turn increases the risk of the surgery. *See* Kiecolt-Glaser et al., *supra*, at 1214; Janice Abbott & Paul Abbott, *Psychological and Cardiovascular Predictors of Anaesthesia Induction, Operative and Post-operative Complications in Minor Gynaecological Surgery*, 34 Brit. J. Clin. Psychologist 613, 621-22 (1995) ("[A] person's pre-operative emotional, cognitive and cardiovascular state influences the induction of anaesthesia, operative problems and short-term recovery .... High levels of heart rate and blood pressure immediately prior to the induction of anaesthesia is a clinically undesirable state which determines induction, operative and post-operative outcomes.").

[24] Catherine Cozzarelli & Brenda Major, *The Impact of AntiAbortion Activities on Women Seeking Abortions in The New Civil War: The Psychology, Culture and Politics* 81, 93 (Linda J. Beckman & S. Marie Harvey eds., 1998).

without regard to the content of anyone's speech, and without unduly burdening speech.

As respondents have demonstrated, the Massachusetts legislature designed the challenged Act not to regulate speech related to abortion, but to confront a particular problem of conduct: harassment and obstruction centered around the entrances to reproductive health clinics. Resp. Br. 12-15. Both the record in this case and the medical literature collected above make clear that that is a unique problem—one that does not apply in other medical contexts. Moreover, the significance of harassment at the clinic door is greater for reproductive health than many other medical facilities in two ways: Timely access to care is particularly essential to patient health, and harassment or obstruction at the clinic door creates particularly adverse effects, in the sphere of reproductive health. The Massachusetts legislature's focus on reproductive health clinics is thus entirely appropriate, and does not convert the content-neutral terms of the statute into a *de facto* content-based restriction. *See, e.g.*, *Ward*, 491 U.S. at 791 ("The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality) ("The First Amendment does not require States to regulate for problems that do not exist.").

Moreover, the statute is narrowly tailored to promote the State's substantial interest in health and safety. Patients who desire to communicate with protesters remain free to do so outside the buffer zone or in any other context. At the same time, the Act's fixed buffer zone protects those most vulnerable

patients whose health would be adversely affected by being subjected to harassment in the immediate vicinity of clinic entrances, or who would delay or forgo treatment in order to avoid such harassment. As noted above, harassment through direct physical approaches—of the sort that occurred under the prior Massachusetts law providing for floating buffer zones, *e.g.*, J.A. 41, 51, 86, 123—is more likely to cause harmful stress to patients. By contrast, the presence of protesters, such as those located outside the fixed buffer zone under the current Act, is less likely to do so. *See* p. 16-17, *supra*. The Act reflects the Massachusetts legislature's considered judgment—supported by decades of experience—that *only* a fixed buffer zone can effectively increase public safety at reproductive health facilities and mitigate the adverse effects of harassment at clinic entrances on patients while respecting the right of protesters to communicate their message, whatever it may be. The Act is thus narrowly tailored to promote the important state interest of patient health and safety. *See Ward*, 491 U.S. at 799 ("[T]he requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'") (omission in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

II. CLINICAL PROVIDERS OF REPRODUCTIVE HEALTH SERVICES ARE ETHICALLY OBLIGATED TO, AND DO, PROVIDE COMPREHENSIVE AND ACCURATE INFORMATION REGARDING RISKS ASSOCIATED WITH, AND ALTERNATIVES TO, ABORTION.

Petitioners' *amici* contend that the Act does not promote women's health and safety—and, improb-

ably, that the Act undermines health and safety—because it reduces women's access to the supposedly "neutral information" about abortion that is allegedly provided only by protesters. Women Who Attest Br. 21; Bioethics Defense Fund Br. 18; Eagle Forum Br. 7-11. This contention is doubly incorrect. First, physicians are ethically obligated to—and do—ensure that their patients provide fully and comprehensively informed consent before undergoing any procedure, including induced abortion. And second, the "neutral" information to which petitioners' *amici* refer is not only not "neutral," but instead medically inaccurate and highly misleading. In short, petitioners' *amici*'s unsupported arguments do not diminish the important State interests served by the challenged law.

A. Informed Consent.

Reproductive health clinicians provide comprehensive and accurate medical information about induced abortion, as well as alternatives to abortion, to all patients before any procedure is performed. For example, ACOG's official policy is that "[a] pregnant woman should be fully informed in a balanced manner about all options, including raising the child herself, placing the child for adoption, and abortion. The information conveyed should be appropriate to the duration of the pregnancy."[25] Assuring that

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[25] ACOG, *College Statement of Policy: Abortion Policy* 2, ¶ 5 (reaffirmed July 2011); *see also, e.g.*, NAF, *2013 Clinical Policy Guidelines* 3 (2013), *available at* http://www.prochoice.org/pubs_research/publications/documents/2013NAFCPGsforweb.pdf ("Obtaining informed consent and assessing that the decision to have an abortion is made freely by the patient are essential parts of the abortion process."). NAF's 2013 Clinical Policy Guidelines likewise state: "The practitioner must ensure that appropriate personnel have a discussion with the patient in which accurate information is provided about the abortion

patients provide fully informed consent is one of physicians' most profound ethical obligations.[26] Moreover, the obligation to provide such information is mandated by statute or case law in every state.[27]

Accordingly, the medical providers who work at reproductive health care facilities thoroughly and accurately educate their patients about the risks and benefits of induced abortion, as well as its alternatives. Physicians and other clinicians are not advocates for abortion, *see, e.g.*, Pet. Br. 27-28; Women Who Attest Br. 11, 21-22, but medical professionals with legal and ethical obligations to ensure that their patients possess full and accurate knowledge of the risks from and alternatives to induced abortion and other reproductive health treatments.

There is thus no merit to petitioners' *amici*'s claim that "misrepresentations [are] often made to women seeking abortion who may be told that pregnancy termination is simply a matter of removing a 'clump

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procedure and its alternatives, and the potential risks and benefits. The patient must have the opportunity to have any questions answered to her satisfaction prior to intervention." *Id.*

[26] *See* ACOG, *Code of Professional Ethics, Code of Conduct* ¶ 5 (July 2011), *available at* https://www.acog.org/~/media/Departments/National%20Officer%20Nominations%20Process/ACOGcode.pdf?dmc=1&ts=20120911T1242523048; NAF, *Ethical Principles for Abortion Care* 2 (2011), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_naf/NAF_Ethical%20_Principles.pdf; *see also* Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 Guttmacher Pol'y Rev. 6, 12 (2007).

[27] Chinue Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 Guttmacher Pol'y Rev. 6, 6 (2006).

of cells.'" Bioethics Defense Fund Br. 16 & n.15.[28] Similarly, petitioners' *amici*'s claim that "the last and perhaps only" chance for a woman to receive the information that petitioners and their *amici* seek to share, due to the lack of a "Woman's Right to Know" law in Massachusetts, is also unavailing. *Id.* at 18. To the contrary, a recent analysis of state-mandated "informed consent" materials from the 22 states that were identified as having such state-developed materials revealed that "although most of the information in the materials about abortion comports with recent scientific findings and the principles of informed consent, some content—specifically, that which is related to breast cancer, psychological impact, fetal pain and referrals for additional care—

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[28] The only authority cited to support this unfounded assertion is an online article from 1990 wherein an individual woman is quoted as claiming that she was misled by an unidentified abortion counselor at an undisclosed location on an unknown date. *See* Monte Harris Liebman, *Fetal Development Information: An Essential Aspect of Informed Consent*, 3 Abortion Decision Making (1990), *available at* http://lifeissues.net/writers/air/air_vol3no1_1990.html. In fact, the woman's quotation is taken from a regional newspaper from *1977*, and relates to an alleged incident that occurred in *1974*. *See* Milton Rockmore, *Are You Sorry You Had An Abortion?*, St. Petersburg Indep., Sept. 5, 1977, at 15-A.

As discussed above, the medical providers at reproductive health care facilities are professionals who comply with their legal and ethical obligations to provide women with accurate information about the abortion procedure, any medically accepted alternatives that might be appropriate for the patient, and medically accurate information about potential risks and benefits of the abortion procedure and its alternatives. NAF, *Ethical Principles for Abortion Care*, *supra*, at 2. There is absolutely no evidence to support petitioners' *amici*'s meritless claim to the contrary.

is either misleading or altogether incorrect."[29] Accord-ingly, as leading organizations of medical profession-als, the medical associations adamantly oppose any legislatively mandated, procedure-specific informed consent requirements as improper interference with the confidential doctor-patient relationship, and unnecessary intrusions into personal medical decis-ions that delay care and interfere with a woman's ability to make a decision for herself, with the counsel of her health care provider. *See* ACOG, *Statement of Policy: Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (May 2013), *available at* http://www.acog.org/~/media/Statements%20of%2Policy/Public/2013LegislativeInterference.pdf; AMA, *H-5.989 Freedom of Communication Between Physicians and Patients*, *available at* http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-5.989.HTM (last viewed Nov. 20, 2013); *see also* Steven E. Weinberger et al., *Legislative Inter-ference with the Patient-Physician Relationship*, 367 New Eng. J. Med. 1557 (2012) (five professional societies representing the majority of U.S. physicians providing clinical care declaring their opposition to such

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[29] Richardson & Nash, *supra*, at 7; *see also* Heather Gould et al., *Predictors of Abortion Counseling Receipt and Helpfulness in the United States*, 23 Women's Health Issues e249, e254 (2013) ("[W]omen receiving care at the facilities required to implement the [state, mandated counseling] laws were significantly less likely to report finding counseling helpful[, which] suggests that these laws may reduce the quality of care or, at the very least, may be having a negative effect on some women's counseling experiences."); *id.* ("Laws requiring the provision of state-mandated, abortion-specific information beyond what is includ-ed under existing informed consent laws do not seem to be helpful to women presenting for abortion care.").

laws, which affect all physicians across different areas of specialization).

B. Petitioners' *Amici*'s Medically Inaccurate Assertions.

Additionally, much of the supposedly "neutral" information petitioners' *amici* argue will not be provided by clinicians is medically inaccurate and highly misleading. Thus, whatever supposed impact the challenged law may have on patients' access to such information from protesters does not undermine the important State interests in promoting health and safety served by the Act.

1. Induced Abortion Does Not Lead To Psychological Harms.

Petitioners' *amici* assert that there is a "direct correlation between a woman's history of abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health," and claim that women who undergo induced abortions have a higher incidence of each of these psychological harms than either the general population or women who have a live birth. *See* Women Who Attest Br. 27 & n.14, 12 n.3; Eagle Forum Br. 8; Bioethics Defense Fund Br. 17 n.17. These claims are wholly unsupported by the scientific evidence.

In 2006, the American Psychological Association (APA) conducted its second comprehensive review of the existing scientific literature relating to psychological response after abortion, and concluded: "[t]he best scientific evidence published indicates that among adult women who have an *unplanned pregnancy* the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that preg-

nancy."[30] The APA Task Force further reported that, while "some women do experience sadness, grief, and feelings of loss following termination of a pregnancy, and some experience clinically significant disorders, including depression and anxiety," there is "*no evidence* sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors." APA Task Force Report, *supra*, at 4 (emphasis added); *see also* Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 Am. Psychologist 863, 885 (2009) ("2009 Update") (updating the APA Task Force Report and reaching the same conclusion: "the claim that observed associations between abortion history and a mental health problem are *caused by* the abortion per

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[30] Brenda Major et al., *Report of the APA Task Force on Mental Health and Abortion* 4 (2008), *available at* http://www.apa.org/pi/women/programs/abortion/mental-health.pdf ("APA Task Force Report") (emphasis in original). The APA Task Force Report continues to stand as the benchmark review of this body of literature. Although a 2011 meta-analysis claimed to find flaws in the report's findings, Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, 199 Brit. J. Psychiatry 180, 180, 185 (2011), this meta-analysis itself has been resoundingly criticized by the scientific community. *See, e.g.*, Acad. of Med. Royal Colls., *Induced Abortion and Mental Health* 14 (Dec. 2011), *available at* http://www.nccmh.org.uk/reports/ABORTION_REPORT_WEB%20FINAL.pdf ("Academy of Medical Royal Colleges Report") (observing, with respect to the 2011 Coleman meta-analysis, that "[d]etails of the search strategy and the number of papers retrieved in the search were not provided, nor was it clear why certain papers and outcomes were excluded"; studies relied on were "not required to control for mental health problems prior to the abortion"; and "[p]revalence rates of mental health problems and factors associated with poorer outcomes were not included in the review and meta-analysis").

se, as opposed to other factors, is not supported by the existing evidence."). Subsequent reviews of available evidence have reached nearly identical conclusions.[31]

The authorities cited by petitioners' *amici* either do not support their medically inaccurate claims to the contrary, or report conclusions based on studies with numerous, significant methodological flaws. *See, e.g.*, APA Task Force Report, *supra*, at 22-24 (identifying "a number of methodological limitations [in the Reardon study cited by *amicus* Eagle Forum] that make it difficult to interpret the results," including "differential exclusion of women with subsequent abortions from the delivery group but not from the abortion group, a sampling strategy that both advantaged the delivery group and rendered generaliz-

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[31] *See, e.g.*, Gail Erlick Robinson et al., *Is There an "Abortion Trauma Syndrome"? Critiquing the Evidence*, 17 Harv. Rev. Psychiatry 268, 276 (2009) ("The most well controlled studies continue to demonstrate that there is no convincing evidence that induced abortion of an unwanted pregnancy is per se a significant risk factor for psychiatric illness."); Vignetta E. Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 Contraception 436, 448-49 (2008) (explaining that all of the studies finding a link between induced abortion and psychological harm suffered from "the most flawed methodology"); *see also* Julia R. Steinberg & Lawrence B. Finer, *Examining the Association of Abortion History and Current Mental Health: A Reanalysis of the National Comorbidity Survey Using a Common-Risk-Factors Model*, 72 Soc. Sci. & Med. 72, 79-80 (2011) [hereinafter, Steinberg & Finer, *Examining the Association*] (explaining that "what drives the relation between abortion and mental health is factors common among women having abortions and women with poor mental health," and that, when prior risk factors were controlled in a nationally representative sample of women, there was no significant relation between abortion and mental health disorders).

ability of the findings problematic; lack of basic demographic information known to be associated with mental health, including marital status and race; lack of information about previous reproductive history, lack of adequate assessment of prior mental health history, lack of adequate information about co-occurring risks (e.g., health status, violence exposure), lack of information about critical characteristics of the abortion decision context (e.g., whether the pregnancy was initially intended and terminated because of fetal anomalies), and inclusion of covariates across analyses and studies that varied for unspecified reasons.").[32]

Accordingly, petitioners' *amici*'s claim that women seeking abortions are misled and inadequately informed about the purported link between induced abortion and psychological harm is unavailing; the weight of the reliable scientific evidence conclusively demonstrates that there is *no causal connection* between abortion and psychological harm.

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[32] For specific criticisms of the myriad methodological flaws in each of the other studies relied on by petitioners' *amici*, see Julia R. Steinberg & Lawrence B. Finer, *Coleman, Coyle, Shuping, and Rue Make False Statements and Draw Erroneous Conclusions in Analyses of Abortion and Mental Health Using the National Comorbidity Survey*, 46 J. Psychiatric Res. 407 (2012); Academy of Medical Royal Colleges Report, *supra*, at 14-15, 18, 47, 153; Trine Munk-Olson et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 New Eng. J. Med. 332, 336-37 (2011); Steinberg & Finer, *Examining the Association*, *supra*; Robinson et al., *supra*, at 275-76; 2009 Update, *supra*, at 871-78; Charles et al., *supra*, at 442, 444, 448; APA Task Force Report, *supra*, at 22-29.

2. Induced Abortion Does Not Cause Subsequent Preterm Birth.

Petitioners' *amici* also claim that induced abortion correlates with an increased risk of subsequent preterm birth, and assert that this "medical risk" is not disclosed to women seeking abortions. Eagle Forum Br. 8-9; Bioethics Defense Fund Br. 17 n.17. However, the most recent evidence confirms that there is no significant risk of preterm birth after one abortion.[33] The sources cited by petitioners' *amici* either do not support their inaccurate claims,[34] or contain conclusions based on earlier studies with significant methodological flaws.[35]

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[33] *See* R. Klemetti et al., *Birth Outcomes After Induced Abortion: A Nationwide Register-Based Study of First Births in Finland*, 27 Human Reprod. 3315, 3317 (2012) (reporting that, after adjusting for mothers' background characteristics, risks of preterm birth were seen only among mothers with three or more surgical, induced abortions); *see also* Clare Oliver-Williams et al., *Changes in Association Between Previous Therapeutic Abortion and Preterm Birth in Scotland, 1980 to 2008: A Historical Cohort Study* (July 2013), *available at* http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001481 (reporting no association between previous abortion and preterm birth from 2000 onwards).

[34] *See* Jay D. Iams et al., *Primary, Secondary, and Tertiary Interventions to Reduce the Morbidity and Mortality of Preterm Birth*, 371 The Lancet 164, 165 (2008), *cited in* Eagle Forum Br. 9; Hanes M. Swingle et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses*, 54 J. Reprod. Med. 95, 103 (2009), *cited in* Eagle Forum Br. 9.

[35] *See* John M. Thorp et al., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obstet. & Gynecol. Surv. 67, 74 (2003), *cited in* Bioethics Defense Fund Br. 17 n.17; Inst. of Med., *Preterm Birth: Causes, Consequences, and Prevention* 519 (July 2006), *cited in* Eagle Forum Br. 9; *see also* Klemetti et al., *supra*, at 3318, 3319 (discussing pervasive methodological flaws in earlier

3. Well-Established Medical Evidence Proves That There Is No Causal Connection Between Induced Abortion And Breast Cancer Risk.

Finally, petitioners' *amicus* Eagle Forum Education & Legal Defense Fund asserts that induced abortions correlate with a "significantly increased breast-cancer risk," and claims that this is one of the "medical risks" that is not disclosed to women seeking an abortion. Eagle Forum Br. 8-9. Notably, Eagle Forum is alone in this assertion.

The purported correlation between induced abortions and breast cancer risk has been thoroughly debunked by mainstream medical authority; exhaustive research from leading medical organizations and specialists in cancer research has conclusively determined that there is *no link* between abortion and breast cancer.[36] Other reviews of the existing scientific literature have reached the same con-

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studies); Carol J. Rowland et al., *Answering Questions about Long-Term Outcomes in Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 252, 255-57 (Maureen Paul et al. eds., 2009) (discussing the numerous methodological flaws in the studies analyzed by Thorp, *supra*).

[36] *See, e.g.*, Nat'l Cancer Inst. (NCI), *Summary Report: Early Reproductive Events and Breast Cancer Workshop* (Mar. 4, 2003, updated Jan. 12, 2010), *available at* http://www.cancer.gov/cancertopics/causes/ere/workshop-report ("Induced abortion is not associated with an increase in breast cancer risk."); NCI, *Abortion, Miscarriage, and Breast Cancer Risk*, *available at* http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage (Jan. 12, 2010) ("[T]he evidence overall still does not support early termination of pregnancy as a cause of breast cancer.").

clusion.[37] *Amicus* Eagle Forum's claim to the contrary is entirely without merit.[38]

CONCLUSION

The medical associations and their members share respondents' interest in promoting safe, timely, and unhindered access to health care. The challenged Act is a content-neutral measure narrowly tailored to promote that goal. For the foregoing reasons, and for the reasons set forth in respondents' Brief, this Court should affirm the judgment.

Respectfully submitted,

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[37] *See, e.g.*, Valerie Beral et al., *Breast Cancer and Abortion: Collaborative Reanalysis of Data from 53 Epidemiological Studies, Including 83,000 Women With Breast Cancer From 16 Countries*, 363 The Lancet 1007, 1014 (2004) ("[T]he totality of the worldwide epidemiological evidence indicates that pregnancies ending as either spontaneous or induced abortions do not have adverse effects on women's subsequent risk of developing breast cancer.").

[38] Significantly, the sole authority cited for this purported correlation was not a study of abortion and does not support *amicus* Eagle Forum's medically inaccurate claim. *See* Kim E. Innes & Tim E. Byers, *First Pregnancy Characteristics & Subsequent Breast Cancer Risk Among Young Women*, 112 Int'l J. Cancer 306, 309 (2004).

AMICUS CURIAE BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO and its affiliated unions have a vital interest in the First Amendment rights of citizens to disseminate their views on the public streets by picketing, handbilling, and engaging in other forms of protected expression. Many of this Court's leading First Amendment decisions involve the efforts of union members to engage in such expressive activities.[2] That being so, the AFL-CIO has filed briefs as *amicus curiae* in a substantial number of this Court's cases involving the exercise of First Amendment rights.[3]

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[1] Counsel for the petitioners and counsel for the respondents have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 398 U.S. 147 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1954); *DeBartolo v. Florida Gulf Coast Trades Council*, 486 U.S. 568 (1988).

[3] *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 752 (1994); *Int'l Soc'y for*

STATEMENT

The question presented by this case is whether a Massachusetts law, Mass. Gen. Laws ch. 266, § 120E1/2 (2013),[4] that bans all presence adjacent to the entrances and driveways of reproductive health care facilities – and therefore substantially limits speech and other expressive activities – violates the First Amendment. The court of appeals rejected both facial and as-applied challenges to the Massachusetts law, concluding that it was a valid time, place, and manner regulation. *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013); *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). The petitioners then sought a writ of certiorari to review the court of appeals' decision, which this Court granted.

SUMMARY OF ARGUMENT

The 2007 amendments to the Massachusetts Reproductive Health Care Facilities Act of 2000 violate the First Amendment by making it a crime for any person to engage in peaceful expressive activities, such as distributing leaflets, displaying placards, or even

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Krishna Consciousness v. Lee, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 483 U.S. 589 (1987); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 453 U.S. 540 (1981).

[4] The substance of Mass. Gen. Laws ch. 266, § 120E1/2 was enacted in 2007 as an amendment to the Massachusetts Reproductive Health Care Facilities Act of 2000, S.B. 148, 181st Gen. Ct. (Mass. Aug. 10, 2000). We therefore refer to the current law as "the 2007 amendments" and to the former law as "the 2000 Act."

conversing, on the public sidewalks adjacent to reproductive health care facilities. The 2007 amendments are not narrowly tailored to achieve the legitimate goal of protecting access to reproductive health care facilities. Rather, those amendments unnecessarily interfere with expressive activities at the core of the First Amendment by forbidding peaceful efforts to engage in conversation with or distribute leaflets to members of the public on the public sidewalks and streets adjacent to these facilities.

Massachusetts's principal argument in support of the 2007 amendments is that it was too burdensome for police to enforce the floating buffer zone contained in the 2000 Act. However, the convenience of enforcing the prophylactic requirements of the 2000 Act cannot, by itself, justify a prohibition on all speech adjacent to reproductive health care facilities. The State has multiple tools to prevent the obstruction of access to clinics, including specific criminal prohibitions against such obstruction. Massachusetts may not simply ban all speech in a traditional public forum because doing so is administratively easier than enforcing laws that balance the rights of persons to access reproductive health care facilities with the public's First Amendment right to free expression.

The comprehensiveness of Massachusetts' prohibition on speech adjacent to reproductive health care facilities also does not excuse the law from the requirement that that prohibition on speech be narrowly tailored. As *Frisby v. Schultz*, 487 U.S. 474 (1988) illustrates, even where a compelling privacy interest is

at stake, the First Amendment does not permit the government to prohibit core expressive activity in a traditional public forum.

Finally, neither *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), nor *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), support Massachusetts' establishment of a fixed buffer zone prohibiting all speech adjacent to reproductive health care facilities. Unlike the blanket prohibition on speech at issue in this case, both *Madsen* and *Schenck* involved injunctions against specific parties at specific locations in response to specific prior unlawful acts. It hardly bears stating that a court's authority to issue a closely-tailored injunction against a party in such circumstances is not justification for a legislature to enact a broadly applicable prohibition on speech applying prospectively to the public at large. Because the law at issue here constitutes such an overbroad legislative enactment, it is, therefore, unconstitutional.

ARGUMENT

1. At issue in this case is the constitutionality of the 2007 amendments to the Massachusetts Reproductive Health Care Facilities Act of 2000. That law was enacted to "restrict[] the free speech activities of "protesting and educating in the vicinity of reproductive health care facilities." Mass. Gen. Laws ch. 266, § 120E1/2 (2013) (capitalization omitted). The 2007 amendments substantially expand the original restrictions on protesting and educating by flatly prohibiting those activities and other forms of expression on public sidewalks in the vicinity of reproductive health care facilities. The amendments make it a crime for anyone to "knowingly

enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility" for any purpose other than going to or from the facility on business or passing through on the way to another destination. *Id.* § 120E1/2(b).

The 2007 amendments to the Act make it a crime for anyone to engage in peaceful expressive activities, such as distributing leaflets, displaying placards, or even conversing, on the public sidewalks adjacent to reproductive health care facilities during the facilities' hours of operation. This places a substantial burden on the ability of a speaker to engage in any expression concerning the facility, its employees or its operations. Such communication will often most effectively take place at or near the facility for the simple reason that the potentially interested audience will most likely be found at that location, *i.e.*, in exactly the place where the statute forbids communication.

For example, a labor union seeking to organize a group of employees will typically seek to communicate with the employees by distributing leaflets to them or by seeking to engage them in conversation on public sidewalks or at driveway entrances immediately outside their workplace. These locations are "particularly appropriate place[s] for the distribution of [union-related] material" and for employees to speak about "matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks omitted). But the Massachusetts statute at issue here would forbid the union from communicating with employees of a reproductive health care facility *in any*

manner on the sidewalks or next to driveways outside their workplace. The union could not distribute leaflets to those employees in these areas. Its representatives could not engage in conversation with them. Indeed, even the facility's employees are forbidden to stop on those sidewalks to discuss the union campaign with their co-workers. *See* JA 93 (employees are forbidden "to engage in any . . . partisan speech within the buffer zone").

The "public way[s] [and] sidewalk[s] adjacent to [] reproductive health care facilit[ies]," Mass. Gen. Laws ch. 266, § 120E1/2(b), like all "public streets and sidewalks," are "traditional public fora," and "'have immemorially been held in trust for the use of the public.'" *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)). "[R]egulations of the time, place, and manner of expression" in such "quintessential public for[a]" must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 481 (quoting *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45 (1983) (citations omitted in *Frisby*)). The 2007 amendments to the 2000 Act clearly fail this test.

The 2000 Reproductive Health Care Facility Act, S.B. 148, 181st Gen. Ct. § 1(d) (Mass. Aug. 10, 2000), was designed "to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." The Act created an 18-foot zone around the entrances and driveways of reproductive health care facilities within

which it was unlawful to approach within six feet of another person for the purpose of communicating with that person without the other person's consent. *Id.* § 2. As enacted, the 2000 law thus allowed those who wished to express their views to a person entering or leaving the facility to do so in all cases from a distance as close as six feet and from an even closer distance with the person's permission. *Ibid.*

Like the eight-foot buffer zone at issue in *Hill v. Colorado*, 530 U.S. 703, 726-27 (2000), the six-foot interval in the 2000 Massachusetts law was large enough to avoid pushing and shoving of individuals who seek to enter a clinic, while close enough to "allow[] [a] speaker to communicate at a normal conversational distance." (Internal quotation marks omitted). Although the "interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients," as in *Hill*, "[t]he [2000 Massachusetts] statute d[id] not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians c[ould] easily accept." *Id.* at 727. Rejecting a constitutional challenge to the 2000 Massachusetts law, the court of appeals explained that "visual and verbal images are able to cross . . . [the] floating buffer zone with sufficient ease that the 'restriction on an unwanted physical approach leaves ample room to communicate a message through speech.'" *McGuire v. Reilly*, 260 F.3d 36, 49 (1st Cir. 2001) (quoting *Hill*, 530 U.S. at 729).

In contrast, the 2007 amendments to the Massachusetts law show no regard for such expressive considerations. In *Schenck*, this Court found a 15-foot floating buffer zone unconstitutional because it "bur-

den[ed] more speech than necessary to serve the relevant governmental interest" by preventing individuals "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." 519 U.S. at 377. *See also Hill*, 530 U.S. at 726-27 (explaining that "[u]nlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a normal conversational distance"). The fixed 35-foot buffer contained in the 2007 Massachusetts amendments is thus, *a fortiori*, far too large to permit "[a] speaker to communicate at a normal conversational distance" or "a leafletter from . . . proffering his or her material[] [in a manner in] which . . . pedestrians can easily accept," *Hill*, 530 U.S. at 726-27 (internal quotation marks omitted), "classic forms of speech that lie at the heart of the First Amendment," *Schenck*, 519 U.S. at 377.

The principal argument made in support of the 2007 amendments was that it was often difficult for the police to tell whether a speaker had been given consent to approach within six feet of the person being addressed. JA 50 ("A[] problem with the existing law is the inability to discern whether a patient, her companions, or facility employees have consented to a given protestor's approach." (testimony of Mass. Attorney General Coakley)); JA 60 ("The [2000] Buffer Zone Law ... makes police work harder, and has been nearly impossible to enforce due to its complexity and the vagueness of the language surrounding consent." (testimony of Dianne Luby, President and CEO, Planned Parenthood League of Mass.)). The authorities thus argued that enforcement of the prophylactic restriction contained in the 2000 Massachusetts law

would be much simpler for the police if *all* activities were barred within a large area around facility entrances and driveways. JA 67-68 ("I think clearly having a fixed buffer zone, where everyone knows the rules and nobody can go in that and protest, will make our job so much easier." (testimony of Captain William Evans, Boston Police Dep't)).

But the convenience of the authorities is not a substantial government interest that justifies forbidding free speech on public sidewalks. *See Schneider v. State*, 308 U.S. 147, 164 (1939) ("If it is said that [enforcement of criminal laws is] less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated . . . , and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."). Rather, no matter how convenient a bar on speech is to the authorities, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

There was, to be sure, some testimony to the effect that anti-abortion protestors were "blocking access to the front door of the clinic, . . . screaming at patients [and] employees inside the bubble zone, touching the arms and shoulders or backs of the patients or employees . . . , standing in front of cars and . . . block[ing] patient and employee access to the garage." JA 80. But all of that conduct was unlawful under the pre-2007 law and could have been prevented through police enforcement or court orders. Other provisions of Massachusetts law make it a criminal offense to "knowingly obstruct[] entry

to or departure from any medical facility," Mass. Gen. Laws ch. 266, § 120E (2013), and to "knowingly obstruct[], detain[], hinder[], impede[] or block[] another person's entry to or exit from a reproductive health care facility," Mass. Gen. Laws ch. 266, § 120E1/2(e). Prohibiting peaceful speech on the sidewalks surrounding the clinics simply would not materially assist the enforcement of the laws against such obstruction. Thus, prohibiting peaceful speech on the sidewalks near the clinics does not bear a sufficiently close relationship to the government interest asserted to justify enactment of the 2007 amendments.

By prohibiting *all* speech and protest activity "on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway," Mass. Gen. Laws ch. 266, § 120E1/2(b), the Massachusetts law amounts to "a complete ban on handbilling," and all other expressive acts, and thus burdens "substantially more speech than necessary," *Ward*, 491 U.S. at 799 n.7, to protect "the rights of persons seeking access to [reproductive health care] facilities to be free from hindrance, harassment, intimidation and harm," Reproductive Health Care Facility Act, S.B. 148, 181st Gen. Ct. § 1(d).

2. The court of appeals acknowledged that "all communicative activities (as opposed to, say, purely violent or aggressive activities) are banned within buffer zones" by the Massachusetts law, yet concluded that "'the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive'" for the law's enactment. *McCullen*, 708 F.3d at 11 (quoting *Hill*, 530 U.S. at 731). That argument completely ignores the requirement that gov-

ernment time, place, and manner regulations be not only content neutral but also narrowly tailored.

Frisby illustrates that the comprehensiveness of a prohibition on speech does not relieve the government from the First Amendment's narrow tailoring requirement. In that case, a town ordinance, on its face, seemed to prohibit all picketing in residential neighborhoods in response to repeated protests outside the home of a doctor who performed abortions. 487 U.S. at 476. While recognizing that "'[t]he State's interest in protecting the . . . privacy of the home'" is "'of the highest order,'" *id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)), the Court strongly questioned whether a blanket ban on picketing in residential neighborhoods could be considered "narrowly tailored to serve a significant government interest." *Id.* at 482 (internal quotation marks omitted). The Court thus applied "a narrowing construction that avoids constitutional difficulties" by interpreting "the ordinance [as] intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Ibid.* As this Court described, this "focused picketing" "do[es] not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . . in an especially offensive way." *Id.* at 483, 486.

In contrast, the Court made clear that "generally directed means of communication . . . may not be completely banned in residential areas," including "handbilling," "solicitation," and "marching." *Id.* at 486 (citing *Schneider*, 308 U.S. at 162-63; *Martin v. Struthers*, 319 U.S. 141 (1943); *Gregory v. Chicago*, 394 U.S. 111, 125 (1969)). *Accord Madsen*, 512 U.S. at 775 (striking down residential picketing buffer zone on authority of *Frisby*). Thus, even though Massa-

chusetts' interest "in protecting the well-being, tranquility, and privacy" of patients seeking medical care at reproductive health care facilities may be "of the highest order," *Frisby* instructs that "more generally directed means of communication . . . may not be completely banned" in a traditional public forum, 487 U.S. at 484, 486.

3. It is no answer to argue that "[t]he fixed buffer zone established by the [2007 amendments] is very similar to the buffer zones that were established by injunction and upheld in *Madsen* [*v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)] and *Schenck* [*v. Pro-Choice Network of Western New York*], 519 U.S. 357 (1997)]." Op. Cert. 15. The fact that the buffer zones in those cases "were established by injunction" against specific individuals and organizations in response to specific unlawful acts fundamentally distinguishes *Madsen* and *Schenck* from this case.

This point is demonstrated by comparing the holdings in *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Carlson v. California*, 310 U.S. 106 (1940), on the one hand, with the holding in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), on the other.

Thornhill and *Carlson* struck down statutes that contained blanket anti-loitering and anti-picketing provisions on First Amendment grounds, noting that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," *Thornhill*, 310 U.S. at 102. *See also Carlson*, 310 U.S. at 113 ("[P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be

regarded as within that liberty of communication which is secured to every person by the [Constitution] against abridgment by a State.").

Subsequently, in *Milk Wagon Drivers*, the Court upheld a state court injunction against all labor protest in certain relevant locations, including peaceful protest activity, where union supporters had previously engaged in extensive "window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings" in the course of a labor dispute. 312 U.S. at 292. Distinguishing the case from *Thornhill* and *Carlson*, which "involved statutes baldly forbidding all picketing near an employer's place of business," the Court held that "the law of a state may be fitted to a concrete situation through the authority given by the state to its courts," namely, through "an injunction derived from and directed towards violent misconduct." *Id.* at 297-98. In contrast to the statutory "ban[s] on all discussion . . . of a matter of public importance" struck down in *Thornhill* and *Carlson*, "[t]he injunction . . . is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation." *Id.* at 298.

In this case, the State's reliance on *Madsen* and *Schenck* to justify its blanket prohibition of speech adjacent to reproductive health care facilities confuses the rule of *Thornhill* and *Carlson* with that set forth in *Milk Wagon Drivers*. Both *Madsen* and *Schenck* – like *Milk Wagon Drivers* – involved "[a]n injunction [that] . . . applie[d] to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group" based on "the group's past actions in the context of a specific dispute between real parties." *Madsen*, 512 U.S. at 762. *See also id.* at 759 n.1 (list-

ing parties enjoined from entering buffer zone, including "all persons acting in concert or participation with [named defendants], or on their behalf"); *Schenck*, 519 U.S. at 366 n.3 (same). In other words, in both *Madsen* and *Schenck* "[t]he parties seeking the injunction assert[ed] a violation of their rights [and] the court hearing the action [wa]s charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public." *Madsen*, 512 U.S. at 762.

Like the injunction prohibiting picketing by union supporters in *Milk Wagon Drivers*, which was based on "the continuance and recurrence of flagrant violence" on and around the picket line, 312 U.S. at 292, the injunctions in *Madsen* and *Schenck* created buffer zones around clinics that applied *only* to those protesters – and those acting in concert with them – who had violated earlier court orders to refrain "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." *Madsen*, 512 U.S. at 758. *See also Schenck*, 519 U.S. at 382. In stark contrast to the law at issue in this case, the injunctions in *Madsen* and *Schenck* did *not* prohibit members of the general public from leafleting or engaging in conversations in the vicinity of the clinics, just as the injunction in *Milk Wagon Drivers* did not forbid protestors without any relation to the labor dispute at issue in that case from engaging in peaceful expressive activities outside Meadowmoor Dairy.[5]

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[5] The debate between various members of this Court over whether injunctions that impact speech "require a somewhat more stringent application of First Amendment principles" than legislative enactments, *Madsen*, 512 U.S. at 765, "should be

It is true, of course, that "a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act," such as, in the labor context, "a statute which authorize[s] the courts of [a state] to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation." *Milk Wagon Drivers*, 312 U.S. at 297-98. And, indeed, the Massachusetts legislature has enacted such a law relating to to the "[o]bstruction of [a]ccess to [m]edical [f]acilities," which criminalizes the knowing obstruction of access to such facilities, including "medical clinic[s]," and provides a mechanism for medical facilities to enjoin such obstruction and seek compensatory and exemplary damages, attorney's fees and costs. Mass. Gen. Laws ch. 266, § 120E. *See also* 18 U.S.C. § 248 (providing similar protections against interference with "[f]reedom of access to clinic entrances" under federal law). Enforcement of such laws through police action or court orders is very effective in ensuring that groups intent on illegal obstruction are not permitted to further their illegal objectives under the guise of engaging in peaceful speech.

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judged by a more lenient standard than legislation," *id.* at 778 (Stevens, J., dissenting), or "warrant[s] strict scrutiny," *id.* at 795 (Scalia, J., dissenting) is not relevant here. At issue in this case is the overbreadth of a state law that bans *all* speech by *all* speakers in a traditional public forum where the state has provided *no* justification whatsoever for the prohibition as it applies to any category of speakers other than anti-abortion protestors. That broad proscription of speech would fall under any of the standards debated in *Madsen*.

But the license for a legislature to devise such "an appropriately drawn act," *Milk Wagon Drivers*, 312 U.S. at 297, does not permit a state to prohibit *all* "protesting . . . in the vicinity of reproductive health care facilities," Mass. Gen. Laws ch. 266, § 120E1/2 (capitalization omitted), in response to "*specific incidents* of patient harassment and intimidation in the areas immediately outside [reproductive health care facilities'] entrances and driveways" by anti-abortion protestors, Op. Cert. 5 (emphasis added). "It is one thing to assume . . . that a prophylactic injunction is necessary when the specific targets of that measure have demonstrated an inability or unwillingness to engage in protected speech activity without also engaging in conduct that the Constitution clearly does not protect. It is something else to assume that all those who wish to speak . . . will similarly abuse their rights if permitted to exercise them. The First Amendment stands as a bar to exactly this type of prophylactic legislation." *Hill*, 530 U.S. at 761 (Scalia, J., dissenting).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *ET AL.*,
Petitioners,

v.

MARTHA COAKLEY, AS ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, THE CENTRAL CONFERENCE OF AMERICAN RABBIS, CONGREGATION AGUDAS ACHIM, CONGREGATION DORSHEI TZEDEK, DISCIPLES FOR CHOICE, DISCIPLES JUSTICE ACTION NETWORK, INTERFAITH ALLIANCE FOUNDATION, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS, JEWISH WOMEN INTERNATIONAL, THE METHODIST FOUNDATION FOR SOCIAL ACTION, THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, THE UNION FOR REFORM JUDAISM, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE* [1]

The *amici curiae* are a diverse group of religious and cultural organizations that advocate for religious freedom, civil liberties, and reproductive freedom. The amici have a strong interest in this case due to their commitment to religious liberty, civil rights, and protecting access to reproductive health care facilities. The *amici* are: the Anti-Defamation League; the Central Conference of American Rabbis; Congregation Agudas Achim; Congregation Dorshei Tzedek; Disciples for Choice; Disciples Justice Action Network; Interfaith Alliance Foundation; the Jewish Council for Public Affairs; Jewish Women International; the Methodist Federation for Social Action; the Religious Coalition for Reproductive Choice; the Union for Reform Judaism; and the Women of Reform Judaism. Further interest statements of particular *amici curiae* can be found in the appendix to this brief.

SUMMARY OF ARGUMENT

The statute at issue in this case, Mass. Gen. Laws ch. 266, § 120E½ (the "Massachusetts Act"), is not unique. It is but one of many statutes, ordinances, and injunctions that have established buffer zones and restricted picketing or demonstrating in close proximity to houses of worship, funeral services, private residences, schools, courthouses, foreign embassies, and polling places, among other locations. The *amici* respectfully submit that, in considering the

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and such consents have been lodged with the Court.

Petitioners' challenge to the Massachusetts Act, the Court should take into account the broader implications of this case for these other instances where buffer zones have been created.

This brief focuses on laws that have created buffer zones and similar protections for houses of worship and funeral services. Like the Massachusetts Act, these laws typically create a neutral area near places of worship and funeral ceremonies and regulate the locations where demonstrators may congregate. Courts have upheld many of these buffer zone protections as reasonable time, place, and manner restrictions that do not unduly impinge upon free speech rights.

The judicial decisions upholding these buffer zones near houses of worship and funeral services have relied extensively on precedents and principles developed in similar cases concerning reproductive health care facilities – including this Court's decisions in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Hill v. Colorado*, 530 U.S. 703 (2000). Significantly, this Court's analyses in *Madsen*, *Schenck*, and *Hill* form the foundation for other courts' conclusions that worship and funeral buffer zone laws are content-neutral, are adequately supported by significant government interests, are narrowly tailored, and allow ample alternative channels for communication.

Consequently, if the Court were to strike down the Massachusetts Act – a statute that is plainly supported by those precedents – that decision would also potentially undermine buffer zone protections afforded to houses of worship and funeral services. If this Court determines that the buffer zone provided by

the Massachusetts Act is constitutionally invalid, then the Court must also be willing to accept that protesters may crowd the doors of synagogues, churches, and mosques, chanting slogans at worshippers as they enter, and that picketers may mingle with the mourners at military funerals, confronting grieving parents with placards proclaiming, "Thank God for Dead Soldiers."

Considered in this broader context, it is undeniable that buffer zones – whether at reproductive health care facilities, houses of worship, or funeral services – are politically neutral. They are simply a reasonable and necessary governmental tool for preserving the constitutionally protected rights of speakers while accommodating the government's legitimate interests in protecting public safety, freedom of access, and personal privacy in a pluralistic society.

ARGUMENT

I. THE FEDERAL GOVERNMENT, STATES, MUNICIPALITIES, AND COURTS HAVE ESTABLISHED BUFFER ZONES FOR HOUSES OF WORSHIP AND FUNERAL SERVICES THAT ARE SIMILAR TO THE BUFFER ZONE IN THE MASSACHUSETTS ACT.

Just as the Massachusetts Act creates a buffer zone at reproductive health care facilities, there are many other statutes, ordinances, and court injunctions that have established buffer zones near houses of worship and funeral services. The reasons for demarcating these buffer zones are similar. Like reproductive health care facilities, houses of worship and funeral ceremonies have often attracted controversial and volatile protests and picketing, which can disrupt and

obstruct access to religious services and funeral ceremonies. And just as patients seeking medical advice and care have no choice but to run the gauntlet of demonstrators outside a reproductive health care facility, so too worshippers attending a religious service, or family and friends attending a funeral, cannot avoid picketers who target those ceremonies. Consequently, in response to public concern, federal, state, and local authorities have implemented and enforced buffer zones near houses of worship and funeral services. Such buffer zones aim to advance significant government interests in promoting public safety, ensuring unfettered access to places of worship and funeral ceremonies, and protecting captive audiences from unwelcome intrusion.

A. Municipal Ordinances Have Established Buffer Zones Around Houses of Worship.

Many municipalities have enacted ordinances to delineate buffer zones near houses of worship that are similar to the provisions of the Massachusetts Act. For example, Santa Barbara, California, has enacted an ordinance that simultaneously protects both places of worship and health care facilities. The ordinance makes it unlawful to conduct any demonstration "within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship" or to "impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility." Santa Barbara, Cal., Municipal Code, § 9.99.030 (2012), *quoted in* Appendix A to *Edwards v. City of Santa*

Barbara, 883 F. Supp. 1379, 1396 (C.D. Cal.) (*Edwards I*), *vacated*, 70 F.3d 1277 (9th Cir. 1995).[2]

The preamble to the ordinance indicates that it was enacted because "persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them," which "interfere[d] with medical treatment" and "freedom of religion." Appendix A, *Edwards I*, 883 F. Supp. at 1394. Echoing the government interests cited by this Court in upholding a buffer zone injunction in *Madsen*, 512 U.S. at 768, the City Council recognized that "such activity near health care facilities and places of worship creates a 'captive audience' situation" because persons seeking access to health care services and religious services cannot avoid the demonstrations, and they should not be expected to "forgo medical treatment" or to refrain from exercising their freedom of religion. Appendix A, *Edwards I*, 883 F. Supp. at 1394. Therefore, while recognizing that demonstrators have a strong countervailing right of freedom of expression, the ordinance attempts to "reconcile and protect the First Amendment rights of

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[2] In addition, the Santa Barbara ordinance contained a "floating" buffer zone provision that no person engaging in demonstration activity within 100 feet of a house of worship or health care facility "shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal." *Edwards I*, 883 F. Supp. at 1395. This provision was held invalid in *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998) (*Edwards II*).

persons near health care facilities and places of worship and the rights of persons seeking to use health care facilities or places of worship" by establishing buffer zones around these locations. *Id.* at 1394-95.

Other cities and towns have enacted ordinances that prohibit demonstrations within a specified buffer zone near houses of worship during services. For example, in Rockford, Illinois, "A person commits disorderly conduct when he knowingly . . . Pickets or demonstrates on a public way within 150 feet of any church, temple, synagogue or other place of worship while services are being conducted and one-half hour before services are to be conducted and one-half hour after services have been concluded." Rockford, Ill., Code of Ordinances § 19-13 (21) (2013).[3] Similarly, a number of Georgia municipalities have established ordinances that prohibit "picketing or demonstrating in front of any building in which the following are located, affecting the normal operation thereof, while the following are in use: (1) A church; (2) A fraternal order; (3) A school; (4) A hospital, nursing home or rest

[3] Other Illinois municipalities have enacted similar ordinances. *See, e.g.*, Auburn, Ill., Code of Ordinances § 18-47(a)(9) (2012); Calumet City, Ill., Code of Ordinances § 62-251(a)(12) (2003); Chicago Heights, Ill., Code of Ordinances § 30-62(j) (2013); North Riverside, Ill., Code of Ordinances, § 9.16.010(J) (2012); South Chicago Heights, Ill., Code of Ordinances § 50-2(a)(10) (2012); Cicero, Ill., Code of Ordinances § 62-6(a)(10) (2013); Naperville, Ill., Code of Ordinances § 10-2-1-1(9) (2013); Hainesville, Ill., Code of Ordinances § 9.12.010(A)(9) (2013); Round Lake Beach, Ill., Code of Ordinances § 4-7-4(A)(9) (2013); Round Lake Village, Ill., Code of Ordinances, § 9.04.050(A)(9) (2012).

home."[4] More broadly, a Kansas municipal ordinance makes it unlawful for "any person to engage in picketing . . . before or about any church in the city." Prairie Village, Kan., Municipal Code art. 9.16 (2013), *quoted in City of Prairie Village v. Hogan*, 855 P.2d 949, 952 (Kan. 1993).

In addition to these ordinances, municipalities sometimes use their police powers to establish buffer zones near houses of worship in connection with particular events. For example, in *World Wide Street Preachers' Fellowship v. Salt Lake City Corp.*, No. 2:04-CV-00279TC, slip op. at 18 (D. Utah Dec. 21, 2004), a federal court held that Salt Lake City could properly limit the areas available for demonstrations in the vicinity of the Church of Jesus Christ of Latter-Day Saints in Temple Square at certain times during the Church's semi-annual conference.

B. Federal And State Statutes Have Created Buffer Zones Around Funeral Services.

The federal and state governments have also enacted various statutes that create buffer zones near funeral services. Most notably, in 2006, Congress passed two laws circumscribing demonstrations at funerals for deceased members of the United States Armed Services: the Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, § 2(a)(1), 120 Stat. 387 (2006) ("Fallen Heroes Act") (codified at 18 U.S.C.

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[4] Fitzgerald, Ga., Code of Ordinances § 18-84 (2013); Quitman, Ga., Code of Ordinances § 40-59 (2005); Albany, Ga., Code of Ordinances § 40-105 (2013); Seminole County, Ga., Code of Ordinances § 40-11 (2013). Although published legislative history is sparse, these types of buffer zone ordinances reflect a government interest in ensuring that worshipers and service-goers retain unfettered access to their places of worship and to allow them to pray without disturbance. *See Edwards II*, 150 F.3d at 1216.

§ 1387 (2012) and 38 U.S.C. § 2413 (2012)); and the Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, § 1(a), 120 Stat. 3480 (2006) ("Funerals Act") (codified at 18 U.S.C. § 1388 (2012)).

The Fallen Heroes Act applies to Arlington National Cemetery and other federal cemeteries under the control of the National Cemetery Administration. As subsequently amended, the Fallen Heroes Act limits demonstrations "during the period beginning 120 minutes before and ending 120 minutes after a funeral" at those cemeteries. 38 U.S.C. § 2413. During that period, it is unlawful to engage in a demonstration (1) within the boundaries of the cemetery or 300 feet of any entrance, where an individual willfully makes or assists in making any noise or diversion that is not part of the funeral and intentionally disturbs the peace or good order of such funeral; or (2) within 500 feet of the cemetery, where an individual willfully, intentionally, and without authorization impedes access or egress from the cemetery. *Id.* The Funerals Act extends similar buffer zone protections to all funerals of members or former members of the Armed Forces at other locations, such as "private cemeteries, funeral homes, and houses of worship." 152 Cong. Rec. H9198, 9199 (daily ed. Dec 8, 2006) (statement of Rep. Conyers); *see* 18 U.S.C. § 1388.

These acts were passed in response to widespread disruption of military funerals by demonstrations, especially by members of the Westboro Baptist Church. *See* 152 Cong. Rec. H2199, 2200-01 (statements of Reps. Buyer and Reyes); 152 Cong. Rec. H9198, 9199 (statement of Rep. Cannon). While recognizing the free speech rights of such protesters, Congress sought also "to protect the

sanctity of military funerals," "the privacy of grieving families as they bury their precious loved ones who died in the service of our country," and the right of "military families . . . to mourn the loss of their husbands, wives, and children in peace." 152 Cong. Rec. H2199, 2200, 2202 (statement of Rep. Buyer); *id.* at 2205 (statement of Rep. Baca). Thus, Congress sought to craft laws that are "content neutral [and are] limited in time, manner, and place to balance the constitutionally protected rights of law-abiding speakers against the legitimate competing interests of unwilling listeners who would otherwise be distracted from an important social objective, the dignified burial of our honored dead." *Id.* at 2201.

Additionally, at least 42 states have enacted statutes that impose time and distance restrictions on demonstrations near funeral services taking place at houses of worship, cemeteries, funeral homes, and other locations.[5] Some states have enacted blended

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[5] Ala. Code § 13A-11-17 (2013); Ark. Code Ann. § 5-71-230 (2013); Cal. Penal Code § 594.37 (2013); Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3), -107(3), -108(2), -117, -125 (2013); Conn. Gen. Stat. § 53a-183c (2013); Del. Code Ann. tit. 11, § 1303 (2013); Fla. Stat. §§ 871.01-.02 (2013); Ga. Code Ann. § 16-11-34.2 (2013); Idaho Code Ann. § 18-6409(2) (2013); 720 Ill. Comp. Stat. 5/26-6 (2013); Ind. Code §§ 35-45-1-3 to -2-1 (2013); Iowa Code § 723.5 (2013); Ky. Rev. Stat. Ann. §§ 525.055, .060, .145, .155 (2013); La. Rev. Stat. Ann. § 14:103 (2013); Me. Rev. Stat. tit. 17-A § 501-A (2012); Md. Code Ann., Crim. Law § 10-205 (2013); Mass. Gen. Laws ch. 272, § 42A (2012); Mich. Comp. Laws §§ 123.1111-.1115 (2013); Minn. Stat. § 609.501 (2013); Miss. Code Ann. § 97-35-18 (2013); Mont. Code Ann. 45-8-116 (2013); Neb. Rev. Stat. §§ 28-1320.01-.03 (2008); N.H. Rev. Stat. Ann. § 644:2-b (2013); N.J. Stat. Ann. § 2C:33-8.1 (2013); N.M. Stat. Ann. § 30-20B-1 to 30-20B-5 (2013); N.Y. Penal Law § 240.21 (2013); N.C. Gen. Stat. § 14-288.4 (2012); N.D. Cent. Code § 12.1-31-01.1 (2013); Ohio Rev. Code Ann. § 3767.30 (2013); Okla. Stat. tit. 21, § 1380 (2011);

statutes that, like the federal statute, enforce buffer zones around the location of a funeral or burial ceremony before, during, and after it takes place. For example, in Oklahoma, "[i]t is unlawful for any person to engage in picketing within one thousand (1,000) feet of the property line of any cemetery, church, mortuary or other place where any portion of a funeral service is held during the period from two (2) hours before the scheduled commencement of funeral services until two (2) hours after the actual completion of the funeral services. Okla. Stat. tit. 21, § 1380 (2011); *see also*, *e.g.*, S.D. Codified Laws §§ 22-13-17 to -20 (2006) ("No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services until one hour after the actual completion of the funeral services.").

As with their federal counterparts, state funeral statutes recognize that the government has a significant interest in "[p]rotect[ing] the privacy of the mourners during the funeral . . . and [p]reserv[ing] a funeral-site atmosphere that enhances the grieving process." *See*, *e.g.*, Colo. Rev. Stat. §§ 13-21-126(2) (2013). At the same time, state legislatures also "recognize[] that individuals have a constitutional right to free speech." *See*, *e.g.*, Neb. Rev. Stat. §§ 28-1320.01 (2008). For this reason, State funeral laws seek to "carefully balance the rights of [demonstrators]

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18 Pa. Cons. Stat. § 7517 (2013); R.I. Gen. Laws § 11-11-1 (2013); S.C. Code Ann. § 16-17-525 (2013); S.D. Codified Laws §§ 22-13-17 to -20 (2013); Tenn. Code Ann. § 39-17-317 (2013); Tex. Penal Code Ann. §§ 42.04, .055 (2011); Utah Code Ann. § 76-9-108 (2013); Vt. Stat. Ann. tit. 13, § 3771 (2013); Va. Code Ann. § 18.2-415 (2013); Wash. Rev. Code § 9A.84.030 (2013); Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6- 105 (2012).

against the privacy rights of those who may be unwilling and captive recipients of the [demonstrators'] message." *Preamble* to 2007 Mont. Laws ch. 10, (codified as Mont. Code Ann. 45-8-116 (2013)).[6]

C. State Statutes Prohibit Willful Disruption Of Religious Services.

States have also enacted statutes that criminalize misconduct that disrupts or interferes with access to religious services. For example, the Missouri "House of Worship Protection Act" makes it unlawful to "[i]ntentionally and unreasonably disturb[] . . . any house of worship by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services." Mo. Rev. Stat. § 574.035 (3)(1) (2013). Moreover, it is unlawful to "[i]ntentionally injure[], intimidate[], or interfere[] . . . with any person lawfully exercising the right of religious freedom in or outside a house of worship or seeking to access a house of worship, whether by force, threat, or physical obstruction." *Id.* § 574.035 (3)(2).

Similarly, the District of Columbia has made it unlawful for "a person to engage in loud, threatening, or abusive language, or disruptive conduct, with the intent and effect of impeding or disrupting the orderly conduct of a lawful public gathering, or of a congregation of people engaged in any religious service

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[6] *See also* N.J. Stat. Ann. § 2C:33-8.1 (West 2013); Mont. Code Ann. 45-8-116 (2013); Neb. Rev. Stat. §§ 28-1320.01-.03 (2008); Okla. Stat. tit. 21, § 1380 (2011); 18 Pa. Cons. Stat. Ann § 7517 (2013); Ga. Code Ann. § 16-11-34.2 (2013); Colo. Rev. Stat. §§ 13-21-126 (2013).

or in worship, a funeral, or similar proceeding." D.C. Code § 22-1321(b) (2013).

These statutes and others like them are concerned with limiting disruption of religious services and ensuring unfettered access to places of worship.[7] While these laws do not expressly create buffer zones around houses of worship, they extend protection beyond the physical boundaries of houses of worship and thereby "regulate traditional public fora, such as adjacent public streets or sidewalks, used for expression." *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *22 (E.D. Mo. Apr. 19, 2013).

D. Courts Have Issued Injunctions To Create Buffer Zones Around Houses Of Worship.

Courts have also issued injunctions creating buffer zones around houses of worship and related locations in response to specific instances of picketing. In *St. David's Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821 (Kan. Ct. App. 1996), for example, the Kansas Court of Appeals upheld a temporary injunction prohibiting members of the Westboro Baptist Church "[f]rom engaging in focused picketing of the plaintiff on public property within 36 feet to the east, within 36 feet to the west, within 36 feet to the north and within 215 feet to the south of the church

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[7] Other statutes include: Idaho Code § 18-6409 (2013); Fla. Stat. § 871.01 (2013); Mass. Gen. Laws ch. 272, § 38 (2012); Mich. Comp. Laws § 752.525 (2012); N.C. Gen. Stat. § 14-288.4 (2012); Nev. Rev. Stat. Ann. § 201.270 (2013); N.M. Stat. Ann. § 30-13-1 (2013); N.Y. Penal Law § 240.21 (2013); S.C. Code Ann. § 16-17-520 (2013); Okla. Stat. tit. 21, § 915 (2011); Wash. Rev. Code § 9A.84.030 (2013); R.I. Gen. Laws § 11-11-1 (2013); VA Code Ann. § 18.2-415 (2013); W. Va. Code § 61-6-13 (2013).

property owned and used for religious purposes by St. David's . . . from a period beginning one-half hour before and ending one-half hour after a religious event." *Id.* at 825. A Kansas court issued the injunction after Westboro members had conducted picketing for over a year at the Topeka intersection where St. David's was located. *Id.* at 824. As discussed further below, the Kansas Court of Appeals held that the injunction was justified by the threat of violence posed by encounters between the Westboro picketers and St. David's congregants and by the demonstrators' interference with the latter group's free exercise of religion. *Id.* at 829-30.

II. RELYING ON THIS COURT'S PRECEDENTS IN *MADSEN*, *SCHENCK*, AND *HILL*, COURTS HAVE UPHELD BUFFER ZONE PROTECTION FOR HOUSES OF WORSHIP AND FUNERAL SERVICES AS REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS.

A. In *Madsen*, *Schenck*, *Hill*, And Other Cases, This Court Has Held That Buffer Zones Are Constitutionally Permissible As Content-Neutral Time, Place, And Manner Restrictions That Are Narrowly Tailored To Serve Significant Government Interests.

As this Court recently observed in *Snyder v. Phelps*, even on public streets and sidewalks, the "choice of where and when to conduct . . . picketing is not beyond the Government's regulatory reach – it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents." 131 S. Ct. 1207, 1218 (2011) (quoting *Clark v. Community for Creative Non-*

Violence, 468 U.S. 288, 293 (1984)). Such restrictions are constitutionally permissible provided that they "'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark*, 468 U.S. at 293).

In accord with these standards, this Court has upheld the creation of buffer zones in a variety of circumstances including – most significantly for this case – situations involving reproductive health care facilities and/or anti-abortion protests. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding an ordinance prohibiting picketing "before or about" a private residence, in a case where demonstrators were targeting the home of a doctor who performed abortions); *Madsen*, 512 U.S. at 757 (upholding an injunction barring demonstrators from a 36-foot fixed buffer zone around the entrances and driveways at a health clinic that performed abortions); *Schenck*, 519 U.S. at 367, 376, 385 (upholding an injunction barring demonstrators from a 15-foot fixed buffer zone around entrances and driveways at medical clinics that provided abortions among other medical services); *Hill*, 530 U.S. at 707-08, 735 (upholding a statute that, within 100 feet of the entrance to any health care facility, makes it unlawful to knowingly approach within eight feet of another person, without that person's consent, to pass a leaflet, display a sign, or engage in oral protest, education, or counseling with such other person); *see also Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding a statute prohibiting picketing near a courthouse with intent to interfere with administration of justice); *Boos v. Barry*, 485 U.S. 312

(1988) (upholding 500-foot buffer zone around foreign embassies in which congregating was prohibited); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a statute creating a 100-foot buffer zone around the entrance to polling places on election day).

Several key points have emerged from the Court's decisions in these cases, particularly *Madsen*, *Schenck*, and *Hill*, which have in turn provided the foundation for subsequent judicial decisions upholding buffer zones protecting houses of worship and funeral services.

First, the Court has held that buffer zones are content-neutral because they do not regulate the content or viewpoint of permissible speech, but merely its location. *See, e.g.*, *Hill*, 530 U.S. at 719 (holding that a Colorado buffer zone statute was content-neutral because it was "not a 'regulation of speech,'" but only "a regulation of the places where some speech may occur"; because it was not adopted due to disagreement with the message of that speech; and because it involved state interests unrelated to the content of the demonstrators' speech).[8]

Second, the Court has recognized that there are significant government interests that justify buffer zones. In *Madsen*, for example, the Court identified three principal government interests that supported the buffer zone injunction in that case: ensuring

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[8] One exception is *Burson v. Freeman*, where the Court held that a Tennessee statute barring campaign-related speech near polling places on election days was not content-neutral because it explicitly suppressed political speech; the Court nevertheless upheld the statute under strict scrutiny because it served a compelling government interest in securing the right to vote free from intimidation. 504 U.S. at 196-97, 208-11.

public safety, order, and free traffic flow; protecting a woman's freedom to seek medical or counseling advice in connection with her pregnancy; and the privacy interests of persons targeted by the picketing, who constituted a "captive" audience as they entered the clinic. 512 U.S. at 767-68. The Court concluded that these interests were "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.* at 768. In *Schenck*, the Court held that a buffer zone injunction protecting clinic entrances and driveways was justified by the government's interests in ensuring public safety, order, and free traffic flow and protecting a woman's freedom to seek pregnancy-related services. 519 U.S. at 376. And in *Hill*, the Court held that a Colorado buffer zone statute was justified by the government's interest in protecting "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests," and the privacy interest of unwilling listeners in situations where the degree of captivity makes it impractical to avoid exposure. 530 U.S. at 715, 718.

Finally, the Court has held that the buffer zones in these cases were, for the most part, narrowly tailored and left open ample alternative channels for communication or, under the stricter test for injunctions, burdened no more speech than necessary.[9] *See Madsen*, 512 U.S. at 769-75 (upholding fixed 36-foot buffer zone near entrances to clinic and its

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[9] In *Madsen* and *Schenck*, which involved buffer zones created by injunctions rather than by statutes, the Court applied a "somewhat more stringent" test, asking "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765; *see also Schenck*, 519 U.S. at 374.

parking lot, because protesters could still be seen and heard, but striking other buffer zone provisions as broader than necessary); *Schenck*, 519 U.S. at 376-82 (upholding fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances as not overly burdensome, but striking floating buffer zones around people and vehicles entering and leaving clinics); *Hill*, 530 U.S. at 725-28 (upholding 8-foot buffer zone around persons within 100 feet of the entrance of any health care facility as narrowly tailored and allowing ample alternative communication, where speakers could still communicate through signs, conversational speech, and proffered handbills).

B. Other Courts Have Relied On This Court's Precedents In *Madsen*, *Schenck*, And *Hill* In Upholding Buffer Zones Around Houses Of Worship And Funeral Services.

Building on the foundation of this Court's buffer zone jurisprudence, other courts have developed a substantial body of case law upholding laws and injunctions creating buffer zones around houses of worship and funeral services as constitutionally permissible time, place, and manner restrictions. In particular, courts have analogized the buffer zone protections for houses of worship and funeral services to the buffer zone protections upheld in the abortion-protest cases. As in *Madsen*, *Schenck*, and *Hill*, courts have concluded that worship and funeral buffer zone laws and injunctions are content-neutral; serve the government's significant interests in ensuring public order, maintaining freedom of access, and protecting privacy; are narrowly tailored; and leave open ample alternative channels for communication.

1. Buffer zone laws are content-neutral.

Courts have held that buffer zone restrictions protecting houses of worship and funeral services, like the buffer zones in the abortion-protest cases, are content- and viewpoint-neutral because these restrictions are "'not a regulation of speech,' but rather 'a regulation of the places where some speech may occur,'" which applies equally to all demonstrators, regardless of viewpoint. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (quoting *Hill*, 530 U.S. at 719).

In *Phelps-Roper v. Strickland*, the Sixth Circuit upheld an Ohio statute that prohibited "picketing or other protest activities" taking place within "three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place." *Id.* at 358 (citing Ohio Rev. Code Ann. § 3767.30 (West 2006)). The statute was challenged by a member of the Westboro Baptist Church, a group that has picketed funerals of American soldiers with signs bearing messages such as "Thank God for IEDs," and "Thank God for Dead Soldiers," to publicize its belief that God is punishing America for its tolerance of homosexuality. *Phelps-Roper v. Strickland*, 539 F.3d at 359.

In concluding that the statute was content-neutral, the court focused on three points, closely following the analysis in *Hill*: 1) the statute only regulated where demonstrators could stand, not what they could say; 2) the restrictions applied equally to all demonstrators; and 3) the state's purpose was only to prevent disruption of funeral services, regardless of the viewpoint or the content of the speech involved. *Id.* at

361 (citing *Hill*, 530 U.S. at 719-20). The Eighth Circuit later reached similar conclusions in *Phelps-Roper v. City of Manchester*, upholding a city ordinance[10] that substantially mirrored the statute at issue in *Phelps-Roper v. Strickland*. *See* 697 F.3d 678, 688-89 (8th Cir. 2012) (citing both *Hill* and *Strickland* in concluding that the ordinance was content-neutral).

Courts considering buffer zones for houses of worship have also held that those laws were content-neutral for similar reasons. In *World Wide Street Preachers' Fellowship v. Salt Lake City Corp.*, No. 2:04-CV-00279TC (D. Utah Dec. 21, 2004), a federal district court upheld Salt Lake City's establishment of "demonstration zones" and other restrictions at the semi-annual conference held by the Church of Jesus Christ of Latter-Day Saints ("LDS"). Under the city's plan, demonstrations by pro- and anti-LDS demonstrators were required to take place within designated zones at certain times of day, and standing still was prohibited in specified areas at certain times. The district court held that these restrictions were content-neutral because, like the Colorado statute in *Hill*, they "clearly limited where protesters could stand or walk when addressing others," but "did not 'place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas,'" and applied "equally to all demonstrators, and regulate[d]

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[10] Manchester Code § 210.264 provides that "no person shall picket or engage in other protest activities . . . within three hundred (300) feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral of burial service." Appendix to *Phelps-Roper v. City of Manchester*, 697 F.3d at 695-96.

only where speech may occur, not the speech itself." *Id.*, slip op. at 12-13.

And in *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998) (*Edwards II*), where the Ninth Circuit upheld an ordinance creating a fixed buffer zone at driveway entrances to houses of worship and health care facilities, the court concluded that the law was content-neutral because it barred "all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed." *Id.* at 1215.[11]

2. Significant government interests justify buffer zone laws.

Courts have also held that buffer zone restrictions protecting houses of worship and funeral services are supported by the same government interests identified in *Madsen*, *Schenck*, and *Hill*. A principal interest often cited is the government's traditional concern for "ensuring the public safety and order, . . . promoting the free flow of traffic on public streets and sidewalks, and . . . protecting the property rights of all . . . citizens." *St. David's Episcopal Church*, 921 P.2d at 829-30 (citing *Madsen*, 512 U.S. at 767). In that case, for example, where the Kansas Court of Appeals upheld an injunction creating a buffer zone around an Episcopal church targeted for demonstrations by

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[11] The Ninth Circuit affirmed the district court's injunction preventing enforcement of a separate provision for a "floating buffer zone" in the Santa Barbara ordinance, which permitted people within one hundred feet of entrances to medical clinics or houses of worship to request that anyone approaching them withdraw to a distance of eight feet. *Edwards II*, 150 F.3d at 1217. In at least some respects, however, that provision resembles the floating buffer zone in the Colorado statute later upheld in *Hill*. *See* 530 U.S. at 707, 712-14, 735.

members of the Westboro Baptist Church,[12] the express purpose of the injunction was to prevent violence between the members of the two churches. *See id.*

Other courts upholding buffer zones for houses of worship and funeral services have similarly pointed to the importance of these zones in maintaining order and preventing violence. In *World Wide Street Preachers' Fellowship v. Salt Lake City Corp.*, for example, the court cited the City's "broad interest in public safety" in upholding its use of demonstration zones at the LDS conference, noting that there had been previous incidents of violence between attendees and demonstrators. No. 2:04-CV-00279TC, slip op. at 16; *see also Edwards II*, 150 F.3d at 1216 (citing "the City's interest in public safety and prevent[ing] direct 'face to face' confrontations that could escalate into violence by physically separating demonstrators from persons entering the driveway areas").

Courts have also reasoned that, just as this Court has held in abortion-protest cases that government has significant interests in protecting patients' freedom of access and privacy, so the government also has significant interests in protecting freedom of access and privacy for persons attending religious services and funerals.

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[12] As noted above, the injunction prohibited members of the Westboro Baptist Church (1) from engaging in focused picketing within 36 feet on three sides and 215 feet on the fourth side of the church property, from one half hour before until one half hour after a religious event and (2) from "making any noise by si[ng]ing, chanting, shouting or yelling, that can be heard through the walls of the church during any religious event." 921 P.2d at 825.

For example, in *St. David's Episcopal Church*, the court compared the government's interest in protecting the privacy of worshippers attending religious services with its interests in protecting the privacy of individuals in their homes, as in *Frisby*, and of clinic patients, as in *Madsen*: "in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well. . . . [T]he right of free exercise [of religion] would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party." 921 P.2d at 830.

Likewise, in *Survivors Network*, where a federal district court upheld a Missouri statute prohibiting conduct that disturbs a house of worship or interferes with those seeking access to a house of worship,[13] the court reasoned that just as the government has significant interests in protecting the privacy of individuals in their homes and patients entering medical facilities, so the state also has "a significant interest in protecting individuals' right to peaceably assemble and to exercise their religious freedom." No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *23-24 (E.D. Mo. Apr. 19, 2013). In that case, the

---

[13] The statute makes it a crime to disrupt a house of worship intentionally and unreasonably "by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services" or by intentionally injuring, intimidating, or interfering with "any person lawfully exercising the right of religious freedom in or outside of a house of worship or seeking access to a house of worship, whether by force, threat, or physical obstruction," or attempting to do so. Mo. Rev. Stat. § 574.035 (2012).

constitutionality of the Missouri statute was challenged by organizations that engaged in peaceful protest activities, including leafleting and holding signs, on public sidewalks outside churches to highlight allegations that clergy had sexually abused children, or to advocate for the rights of women and gay, lesbian, bisexual, and transgender people, and for racial justice. *Survivors Network*, No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *4-6. While recognizing that these activities were clearly afforded First Amendment protection, and could "not be restricted simply because the speaker's message may offend his audience," the court also noted that "this right is not absolute; the government may curtail disruptive and unwelcome speech to protect unwilling listeners when other important interests and values are implicated." *Id.* at *14 (citing *Hill*, 530 U.S. at 716, and *Phelps-Roper v. City of Manchester*, 697 F.3d at 686).

Similarly, in cases involving buffer zones for funeral services, courts have held that "mourners attending a funeral or burial share a privacy interest analogous to those which the Supreme Court has recognized for individuals in their homes . . . and for patients entering a medical facility." *Phelps-Roper v. City of Manchester*, 697 F.3d at 692 (citing *Frisby*, 487 U.S. at 484-85; *Hill*, 530 U.S. at 717; and *Madsen*, 512 U.S. at 767-68). As the United States Court of Appeals for the Eighth Circuit explained:

> Mourners are similarly situated because they must also be in a certain place at a certain time to participate in a funeral or burial and are therefore unable to avoid unwelcome speech at that place and time. A significant governmental interest exists in protecting

> their privacy because mourners are in a vulnerable emotional condition and in need of 'unimpeded access' to a funeral or burial, quite like the patients entering medical facilities protected in *Hill*. . . .

Id. (internal citation omitted); *see also Phelps-Roper v. Strickland*, 539 F.3d at 364-65 ("Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility."); *id.* at 366 ("[J]ust as 'persons who attempt to enter health care facilities . . . are often in particularly vulnerable physical and emotion conditions,' . . . it goes without saying that funeral attendees are also emotionally vulnerable.") (quoting *Hill*, 530 U.S. at 729) (internal brackets and citation omitted). As Justice Alito also observed in his dissent in *Snyder v. Phelps*, the enactment of laws creating buffer zones around funeral services "dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order" because "the emotional well-being of bereaved relatives is particularly vulnerable." 131 S. Ct. at 1227 (Alito, J., dissenting).

As these excerpts show, courts have recognized that, like patients entering a clinic, worshippers attending a religious service and mourners attending a funeral merit some measure of protection because they are captive audiences in a confrontational setting, who cannot avoid the intrusiveness of unwanted speech. *See Phelps-Roper v. Strickland*, 539 F.3d at 362 (discussing decisions holding that "funeral attendees are a captive audience [for] unwanted speech, and the state has a significant interest in their protection"); *Phelps-Roper v. City of Manchester*, 697 F.3d at 693 ("It is unreasonable to expect a family or friend of the

deceased to reschedule or forgo attending the funeral so as to avoid offensive picketing."); *see generally Hill*, 530 U.S. at 717-18 ("The right to avoid unwelcome speech . . . can also be protected in confrontational settings. . . . [O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'") (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

3. Buffer zone laws are narrowly tailored and allow alternative channels for communication.

Finally, courts have followed *Madsen*, *Schenck*, and *Hill* in generally holding that buffer zones protecting houses of worship and funeral services are narrowly tailored and allow ample alternative channels of communication, or burden no more speech than necessary.

In *Edwards II*, for example, the Ninth Circuit held that Santa Barbara's eight-foot buffer zone around driveways of places of worship and health care facilities was narrowly tailored to serve the city's purpose and permitted ample alternative channels of communication because it was smaller than the buffer zones approved in *Madsen* and *Schenck* and provided a "clear, easily enforced zone of protection for the driveway entrances; facilitate[d] the free flow of traffic by preventing protesters from blocking entrances; and futher[ed] the City's interest in public safety and prevent[ing] . . . violence." 150 F.3d at 1216. The court observed that the ordinance was "narrowly tailored to the City's interest in ensuring access to religious worship" and "permit[ted] ample alternative avenues of communication, by placing no limit on

speech or expressive activity outside a narrow zone." *Id.* at 1217.

In *Survivor's Network*, the court held that the Missouri statute protecting houses of worship was narrowly tailored and left open alternative channels of communication because protesters could still stand on the sidewalks near worship facilities as long as they did not block ingress and egress, and they could also contact their target audiences by phone, mail, or internet, or by publishing editorials in the local newspaper. No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *26-27.

Courts have also held that buffer zones can be much larger than those authorized in *Madsen* and *Schenck* and still be narrowly tailored. In *Phelps-Roper v. Strickland*, for example, the Sixth Circuit upheld a statute creating a 300-foot buffer zone around funeral services. The court reasoned that "*Frisby*, *Hill*, and *Madsen*, read together, establish that the size of the buffer zone is context-sensitive, and that in this case, the 300-foot buffer zone is not too broad." 539 F.3d at 368. "Given that numerous mourners usually attend a funeral or burial service, the size of a buffer zone necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence, or a single individual entering a medical clinic." *Id.* at 371; *see also Phelps-Roper v. City of Manchester*, 697 F.3d at 694 (holding that 300-foot buffer zone protecting funeral services was sufficiently narrowly tailored, comparing it to the 500-foot buffer zone upheld in *Boos* and the 100-foot buffer zone upheld in *Hill*, and noting that "[p]icketers can still reasonably

communicate their message to funeral attendees and others").[14]

III. INVALIDATION OF THE MASSACHUSETTS ACT COULD POTENTIALLY UNDERMINE OTHER BUFFER ZONE PROTECTIONS FOR HOUSES OF WORSHIP AND FUNERAL SERVICES.

The grounds on which the Petitioners seek to invalidate the Massachusetts Act are also potentially applicable to many of the buffer zone restrictions protecting houses of worship and funeral services. Petitioners' arguments should be rejected because they are inconsistent with this Court's precedents, as the United States Court of Appeals for the First Circuit twice held in *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) (*McCullen I*), *cert. denied*, 559 U.S. 1005 (2010), and *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013) (*McCullen II*), *cert. granted*, 133 S. Ct. 2857 (2013). But if the Court were to accept those arguments and strike down the Massachusetts Act, then that decision could also call into question the worship and funeral buffer zone laws discussed above.

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[14] In a later decision, *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013), the Eighth Circuit also upheld the fixed buffer zone provisions of a Missouri statute prohibiting picketing within 300 feet of any location where a funeral is held, Mo. Rev. Stat. § 578.502 (2006), but severed as unconstitutional a provision that extended that protection to funeral processions. The court also invalidated a broader statute outlawing picketing about any location at which a funeral is held, Mo. Rev. Stat. § 578.501 (2006), because the court concluded that the statute failed to define the limits of the area where disruptive speech is prohibited.

A. Buffer Zone Laws Can Be Content- And Viewpoint-Neutral Even Though They Target Particular Locations Or Events.

The Petitioners argue that the Massachusetts Act is not content- or viewpoint-neutral because it only applies to reproductive health care facilities where abortions are performed and exempts clinic employees. Petitioners contend that because the Massachusetts Act only targets these clinics, "virtually all of the speech burdened by the Act will be speech about abortion." Pet'rs' Br. at 24. Petitioners also assert that the Act is not viewpoint-neutral because it exempts clinic employees as they enter or exit the facility. *Id.* at 27.

Similar arguments can be made about the worship and funeral buffer zone laws discussed above. Buffer zones prohibiting demonstrations near houses of worship, for example, will likely impact protests against a denomination's policies, teachings, or practices. And because these protective regulations necessarily permit access by those attending the religious or funeral service, as well as those employed in providing those services – indeed, that is their goal – it could be argued that they also favor the attendees' viewpoint over that of demonstrators. If the Massachusetts Act is invalid because it focuses on reproductive health care facilities and protects access to those facilities for patients and employees, then the buffer zone laws protecting places of worship and funeral services would be equally at risk.[15]

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[15] In the brief of *amici curiae* State of Michigan and 11 Other States filed in support of Petitioners, the *amici* contend that the Massachusetts Act is not content- and viewpoint-neutral because it permits employees of the reproductive health care facility to

However, the mere fact that a law indirectly affects one particular group of protesters more than another does not mean that it is content-based or discriminates against one point of view. *See Madsen*, 512 U.S. at 763 ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Edwards II*, 150 F.3d at 1216 n.3 ("The fact that a majority of those prosecuted under the [buffer zone] ordinance have been anti-abortion protesters does not permit an automatic inference of discriminatory purpose in its adoption."). It is striking, for example, that four of the cases discussed above all involved the Westboro Baptist Church; yet the courts did not conclude that the buffer zone restrictions in those cases were content-based or discriminated against a particular viewpoint. *See Phelps-Roper v. Koster*, 713 F.3d 942, 950 (8th Cir. 2013); *Phelps-Roper v. City of Manchester*, 697 F.3d at 689; *Phelps-Roper v. Strickland*, 539 F.3d at 361; *St. David's Episcopal Church*, 921 P.2d at 829.

The proper test for content- and viewpoint-neutrality, as Justice Souter pointed out in his concurrence in *Hill*, is "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Hill*, 530 U.S. at 737 (quoting *Ward*, 491 U.S. at 791). As the First Circuit held with regard to the Massachusetts Act, *see McCullen I*, 571 F.3d at 176, and as numerous other courts have held regarding other buffer zone restrictions, as discussed above, these laws are

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enter the buffer zone. Mich. Br. at 12. By the same token, a buffer zone protecting a house of worship or funeral service would be labeled discriminatory for permitting access by a rabbi, priest, or minister who performs the service.

content-neutral because they do not regulate speech, but only the places where speech may occur, and because they were enacted for legitimate government purposes, such as ensuring public safety.

B. Buffer Zone Laws Can Be Narrowly Tailored Even Though They Limit Direct Personal Contact.

Petitioners also argue that the Massachusetts Act is not narrowly tailored, is overbroad, and does not leave open sufficient ample alternative channels of communication because it limits opportunities for direct personal conversations and leafleting within the prescribed buffer zone. Pet'rs' Br. at 40-52.

Again, similar arguments can be made about the buffer zone laws protecting houses of worship and funeral services. Like the Massachusetts Act, many of these laws establish a fixed buffer zone around the entrance to a house of worship or to a place where a funeral service is being conducted. Particularly in the case of the funeral service statutes, the range of these buffer zones is often much larger than the 35-foot radius prescribed in the Massachusetts Act. Such laws naturally make it difficult for protesters to converse directly with or hand leaflets to attendees at religious or funeral services within the buffer zone. If the Massachusetts Act could be invalidated on that ground, then so could many other worship and funeral buffer zone laws discussed above.

Notably, however, courts considering worship and funeral buffer zone restrictions have rejected the argument that these laws are invalid because they do not permit adequate direct contact between protesters and their target audience. The Sixth and Eighth Circuits have held that even 300-foot buffer zones for

funerals are narrowly tailored and allow ample alternative communication. As the court observed in *Phelps-Roper v. City of Manchester*, even with a 300-foot buffer zone, "[p]icketers can still reasonably communicate their message to funeral attendees and others. Other than the narrow time and place restrictions in the ordinance, no limit is placed 'on the number of speakers or the noise level, including the use of amplification equipment' or 'on the number, size, text, or images of placards.'" 697 F.3d at 694 (quoting *Phelps-Roper v. Strickland*, 539 F.3d at 371); *see also Phelps-Roper v. Strickland*, 539 F.3d at 371-73. If these 300-foot buffer zones permit adequate alternative communication, then *a fortiori* the 35-foot buffer zone in the Massachusetts Act cannot be unduly burdensome.

Moreover, courts have given short shrift to the argument that a buffer zone is overbroad simply because it prohibits protesters from reaching their intended audience through direct contact, be it conversation or leafleting, within its confines. For example, in *Survivors Network*, the Court rejected the plaintiffs' argument that "allowing them to picket or distribute leaflets at a more remote location or time would not give Plaintiffs enough opportunity to direct their intended message at their intended recipients." No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *26; *see also World Wide Street Preachers' Fellowship*, No. 2:04-CV-00279TC, slip op. at 17 (rejecting plaintiffs' argument that, "by prohibiting them from using [certain prime areas], the City has prevented them from reaching their intended audience").

C. Invalidating The Massachusetts Act Could Undermine The Legal Basis Supporting Buffer Zones Around Houses Of Worship And Funeral Services.

As discussed above, courts that have upheld buffer zones around houses of worship and funerals have relied on this Court's foundational decisions upholding buffer zones around reproductive health facilities. As the courts have recognized, all three situations involve similar characteristics: they are confrontational settings where the public sphere intersects with the private, and where the right to free speech may collide with other rights, such as the right to free exercise of religion, the right of survivors to honor the dead with dignity and in privacy, and the right of women to seek medical or counseling services. Accordingly, the Court's decision in this case will have far-reaching implications for buffer zone laws and injunctions protecting houses of worship and funeral services.

Therefore, in considering Petitioners' challenge to the Massachusetts Act, the Court should also consider how it would view Petitioners' arguments as they might be applied to other buffer zone laws in other contexts. If, as Petitioners contend, the Massachusetts Act is not content-neutral because it targets reproductive health care facilities, then buffer zones for houses of worship and funeral services, especially military services, arguably share the same infirmity. If, as Petitioners contend, the Massachusetts Act is not narrowly tailored and is overbroad because it restricts conversational speech and leafleting within the buffer zone, then by the same token the buffer zone protections for houses of worship and funeral services are also arguably overly restrictive. But then the Court must be

willing to contemplate that government cannot protect worshippers from having to run a gauntlet of aggressive protesters, who thrust handbills at them or harangue them about their denomination's shortcomings, just to attend services. Then the Court must also contemplate that government cannot restrict protesters from joining mourners at military funerals on public ground and confronting grieving families with signs telling them to "Thank God for Dead Soldiers."

The same constitutional analysis that supports buffer zones for houses of worship and for funeral services also supports the Massachusetts Act. This Court cannot strike down the Act without potentially triggering a jurisprudential domino effect that could ultimately topple the statutes, ordinances, and injunctions creating buffer zones around houses of worship and funeral services as well.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

FURTHER STATEMENTS OF INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League ("ADL") is a human relations organization founded 100 years ago "to secure justice and fair treatment to all citizens alike." ADL is committed to safeguarding principles of religious and individual liberty, including freedom of speech and association, the right to privacy, and reproductive freedom. The right to abortion, and the right to oppose abortion, raise sharp, conflicting, and competing interests, which must be accommodated. ADL believes that the statute at issue, which creates a 35-foot buffer zone around reproductive health care facilities, respects the rights of individuals to voice their opinions and, at the same time, protects the ability of other individuals to exercise their constitutional rights. In support of these principles, ADL has filed briefs in this Court in such cases as *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

* * *

Congregation Agudas Achim, a Reconstructionist Jewish congregation in Attleboro, Massachusetts, and Congregation Dorshei Tzedek, a Reconstructionist Jewish congregation in West Newton, Massachusetts, are deeply concerned with the health and well-being of all people, and affirm the importance of access to reproductive health services for all women in need, in accordance with their own conscience and the best

advice of their health care providers. We believe in the importance of women's access to reproductive services without fear of harassment or other obstacles to attaining care.

* * *

Disciples for Choice is an unapologetically pro-choice organization within the Christian Church (Disciples of Christ). We believe that a woman should have full control over her own body and therefore over all decisions related to reproduction. We oppose any restrictions on these basic rights as violations of religious liberty and attacks on God-given agency of women; and we stand ready to stand alongside any and all people of faith and conscience who work to defend and preserve these rights.

* * *

Disciples Justice Action Network is a network of individuals, congregations, and organizations within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, freedom, and inclusion in both church and society. Our mission is to promote a passion for justice in our churches, provide prophetic Disciples leadership to ecumenical and interfaith coalitions, and work together with all people of good will to build the Beloved Community envisioned by Dr. Martin Luther King, Jr. As a justice action network, we are committed to reproductive justice for all women and for the availability of the full range of options in reproductive health care.

* * *

Interfaith Alliance Foundation is a 501(c)(3) non-profit organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance

Foundation. Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

* * *

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 15 national and 125 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. The JCPA believes that reproductive health decisions are best made by individuals in consultation with their families and health care professionals based on personal religious beliefs; and, that restrictions on the right to choose and lack of access to reproductive health services threaten a constitutionally-protected individual right.

* * *

Jewish Women International ("JWI"), with 50,000 members and supporters across the country, is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize the full potential of their strength. In 1968, five years before *Roe v. Wade*, JWI (formally B'nai B'rith Women) called for laws that would protect

women from having to seek often life-threatening illegal abortions, a right that the organization has reaffirmed multiple times through the years. Since the landmark 1973 Supreme Court decision in *Roe v. Wade,* we have been an unwavering Jewish voice for comprehensive reproductive health services. JWI continues to advocate for access to reproductive health information and services, which build a foundation for healthier families and communities, and believes that women deserve to be able to make private health decisions according to the dictates of their own faith and conscience.

* * *

Founded in 1907, the Methodist Federation for Social Action ("MFSA") is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing and advocacy. For MFSA, reproductive justice means that every child should be a wanted child, one supported by adequate prenatal, perinatal, maternal, and child care; further, access to family planning, adequate nutrition, medical, spiritual, emotional and psychological care and meaningful employment to support oneself and one's family should be readily available to all the people of the world.

* * *

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political

means to experience the sacred gift of sexuality with health and wholeness.

* * *

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, affirm the importance of ensuring appropriate resources and measures, including buffer zones, exist to protect providers, patients, and premises of reproductive care facilities.

AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF BIOETHICS DEFENSE FUND, JOHN M. THORP, JR., M.D., AND MAUREEN L. CONDIC, PH.D. IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE PRESENTED

Whether Massachusetts' thirty-five foot speech exclusion law, that effectively renders useless pamphleteering about abortion and the beginning of human life, unconstitutionally censors petitioners and screens women from receiving information that is highly relevant to the moral question underlying their abortion decision, a decision that this Court has stated should be "thoughtful and informed."

INTEREST OF *AMICI CURIAE* [1]

Bioethics Defense Fund (BDF) is a non-profit, public-interest legal and educational organization whose attorneys collaborate with leading academics, medical doctors and scientists to provide law and policy consultation, across the nation and abroad, based on the latest medical evidence and grounded in sound medical ethics that respect the dignity of the human person. BDF attorneys draft model legislation and engage in strategic litigation on issues involving abortion, biotechnology, and end of life issues, often in the context of conscience rights and the protections of the First Amendment. BDF attorneys engage in educational speaking engagements in the nation's leading law schools and medical schools, and serve as a resource for nationally syndicated writers.

BDF also files amicus briefs at all levels of state and federal courts, including several amicus briefs filed in

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk of Court. *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

this Court's cases addressing issues surrounding abortion, including *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144; *Gonzales v. Carhart*, No. 051382; and most recently in *NFIB v. Sebelius*, No. 11-398/11-398/11-400, addressing issues of religious liberty in relation to the abortion premium provisions of the Affordable Care Act.

John M. Thorp, Jr. M.D. is the McAllister Distinguished Professor of Obstetrics and Gynecology at the University of North Carolina, Chapel Hill School of Medicine. He has an active practice in obstetrics and gynecology with over 4000 patients. Dr. Thorp serves as Co-Director of the North Carolina Program for Women's Health Research. In that capacity, he has conducted research on fetal development, and the health effects of induced abortion on women's psychological and physical health. He has an extensive research history including key roles in more than 45 major funded studies that include a prospective cohort of pregnancy outcomes that is in its third cycle of federal funding. He is lead author of a major peer-reviewed study: J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OB/GYN Survey 58(1): 67-79 (2003).

Dr. Thorp is a productive author with more than 100 peer-reviewed publications, 20 commentaries, and 12 book chapters to his credit. Of note, he is an experienced editor and peer reviewer, who reviews for journals ranging from the NEW ENGLAND JOURNAL OF MEDICINE to PEDIATRIC AND PERINATAL EPIDEMIOLOGY, with a special interest in advancing the quality of the literature in women's health. He

was recently honored by the editors of OBSTETRICS AND GYNECOLOGY as among their most valued reviewers.

Maureen L. Condic, Ph.D., a research scientist, is Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine. Dr. Condic earned a doctorate degree at University of California, Berkeley, and was a postdoctoral fellow at University of California, Berkeley and University of Minnesota. Her primary research focus since 1997 has been on the development of the nervous system, and research on the regeneration of embryonic and adult neurons of animal models following spinal cord injury. Dr. Condic is a prolific author on issues addressing embryology, stem cell research, and human cloning, including a book chapter entitled *Pre-implantation stages of human development: the biological and moral status of early embryos* found in the book, IS THIS CELL A HUMAN BEING?: EXPLORING THE STATUS OF EMBRYOS, STEM CELLS AND HUMAN-ANIMAL HYBRIDS (2011) (Eds. Antoine Suarez, Joachim Huarte. Social Trends Institute Monograph Series)(Springer, New York, NY).

In 1999, Dr. Condic was awarded the Basil O'Connor Young Investigator Award for her studies of peripheral nervous system development. In 2002, she was named a McKnight Neuroscience of Brain Disorders Investigator, in recognition of her research in the field of adult spinal cord regeneration. In addition to her scientific research, Dr. Condic teaches both graduate and medical students. Her teaching focuses primarily on embryonic development. She is the author of over 50 peer-reviewed scientific studies and reviews.

Amici Bioethics Defense Fund, Dr. Thorp and Dr. Condic each have an interest in free speech that allows the disciplines of medicine and science to inform the

moral questions faced by individuals and society, especially when it is relevant to aiding women in making thoughtful and informed decisions about their pregnancies.[2]

SUMMARY OF THE ARGUMENT

Amici present an analysis that brings into focus how the challenged Massachusetts statute operates to render virtually impossible speech on abortion and the underlying question of when human life begins via pamphleteering, a venerable and time-honored form of speech that is unconstitutionally trivialized by both Massachusetts and the lower court ruling.

While alternate means of communication, such as shouting through bullhorns, waving large signs, and wearing costumes, seem to satisfy the lower court's appreciation of the First Amendment, the relegation of petitioners to such speech forms completely disregards the classically protected activity of peaceful pamphleteering.

Some of the pamphlets that petitioners' are thwarted from proffering by operation of the challenged statute highlight the profound moral issue at the heart of the abortion debate by depicting the human being at various stages of embryonic and fetal development to aid women in making an abortion decision that is "thoughtful and informed." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992).

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[2] John M. Thorp, Jr., M.D. and Maureen L. Condic, Ph.D. file as amici in their individual capacities; this brief does not represent the views or positions of the universities that employ them.

The pamphlets depict medical drawings and/or photographs of the developing unborn child at several points during the 40 weeks of gestation, accompanied by text such as the following:

> Month 2: The developing baby is now called a 'fetus,' a Latin word meaning 'little one.' She is making rapid progress developing all her external and internal organs, and by 8 weeks all her body systems are present.[3]

It is apparent that medical drawings and photographs accompanied by written information are impossible to communicate via a large sign or bullhorn at a distance of thirty-five feet or more. Yet, the lower court relegates Petitioners and other sidewalk counselors to the use of such boisterous methods of communications without regard to the protection granted to the activity of pamphleteering recognized throughout our nation's history and replete in this Court's First Amendment jurisprudence.

To the contrary, the lower court's ruling provides a classic example of the profound concerns expressed by Justices Scalia and Kennedy in their dissents in *Hill v. Colorado*, 530 U.S. 703 (2000):

> As expressed by Justice Scalia:
>
> For those who share an abiding moral or religious conviction *(or, for that matter, simply a biological appreciation) that abortion is the taking of a human life*, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur is

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[3] Exhibit B-1 to the Declaration of Eleanor McCullen, First Circuit Joint Appendix (No. 12-1334) at 224-225.

> outside the entrances to abortion facilities. By upholding these restrictions on speech in this place the Court *ratifies the State's attempt to make even that task an impossible one.*"

Id. at 763 (Scalia, J., dissenting)(emphasis added).

And as set forth by Justice Kennedy:

> Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. *It in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet.* The lack of care with which the Court sustains the Colorado statute reflects a most troubling abdication of our responsibility to enforce the First Amendment.

Id. at 791(Kennedy, J., dissenting)(emphasis added).

The free speech exclusion zone statute upheld in *Hill* (characterized by Justices Scalia and Kennedy as making abortion-related pamphleteering "impossible" because it relegates speakers to a "bullhorn" rather than a "peaceful, face-to-face exchange of a leaflet") imposed what seems, in the light of the Massachusetts statute, to be a quite modest eight feet.

The challenged zone in this case dwarfs the zone upheld in *Hill*. Here, the challenged statute, MASS. GEN. LAWS ch. 266, § 120E1/2 (2007), makes it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The

law applies only at abortion clinics and exempts from its scope, among others, clinic "employees or agents ... acting within the scope of their employment." *Id.* In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to express a viewpoint opposed to abortion.

As discussed below, the pamphlets that petitioners are effectively prevented from proffering by operation of the Massachusetts statute are (1) protected by the First Amendment as core political speech, and (2) highly relevant to the woman's "thoughtful and informed" abortion decision, in accord with this Court's recognition of the profound moral issue at the heart of the abortion controversy.

Amici urge this Court to conclude that, especially in reference to pamphleteering, Massachusetts has unconstitutionally censored petitioners' speech and screened women from receiving relevant information that underscores the profound moral issue at the heart of the abortion debate. Under this Court's jurisprudence, the pro-life speakers, the human development photographs and information contained in their pamphlets, and the message that women deserve better than abortion cannot be disfavored as they are by Massachusetts's heavy-handed and blatant attempt at censorship.

ARGUMENT

I. THE MASSACHUSETTS SPEECH EXCLUSION LAW RENDERS USELESS THE PROTECTED ACTIVITY OF PAMPHLETEERING, TRIVIALIZING BOTH THE FIRST AMENDMENT AND THIS COURT'S UNDERSTANDING THAT AT THE HEART OF THE ABORTION DECISION IS A PROFOUND MORAL QUESTION

A. Petitioners' Activity of Pamphleteering About Abortion and When Human Life Begins is Protected by the First Amendment and, of All the Speech Activities Undertaken, the Most Impacted by the Speech Exclusion Zone

1. Speech on abortion lies at the core of the First Amendment

Speech on abortion is one of the most basic moral and political issues in all of contemporary discourse, and pamphleteering is arguably the most venerable and time-honored form of speech in American history. The challenged statute's thirty-five foot speech exclusion zone effectively forecloses the petitioners' activity of offering pamphlets containing depictions and information on prenatal human development – information that is critical to a woman's "thoughtful and informed" decision.[4]

This Court has repeatedly recognized that speech on the great political issues of the day lies at the core of the First Amendment.[5] It cannot be denied that over

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[4] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992).

[5] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976).

the last forty years the issue of abortion has dominated the political life of the nation like few others. The question of legalized abortion in all of its constitutive elements – constitutional, political, social, medical and moral – has impacted the country in such myriad and profound ways that seemingly no aspect of our common life has been left untouched. Speech on abortion is, therefore, so quintessentially political that it must necessarily elicit the greatest protection offered by the First Amendment.

Consequently, the Massachusetts's statute at issue here, which creates a *cordon sanitaire* that effectively excludes any meaningful pro-life speech, must trigger the highest judicial scrutiny. *See* Petitioners' Brief at 21-32. Without meaningful judicial review, Massachusetts' censorship of disfavored viewpoints and contents will simply fester under the cover of "reasonableness."

2. Pamphleteering is arguably the most venerable and time-honored form of speech in American history; its exclusion by Massachusetts is no trivial infringement

In this age of electronic wizardry, the seemingly outdated pamphlet is still arguably one of the most venerable and time-honored forms of communication in American history. "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.'"[6]

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[6] *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 910 (1982)(*quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419(1971)(*citing Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147, (1930); *Lovell v. Griffin*, 303 U.S. 444 (1938)).

Indeed, absent the unimpeded distribution of political pamphlets throughout the colonies, the American Revolution and the Constitution it birthed might never have occurred.

As Harvard professor emeritus Bernard Bailyn has written in his magisterial study on pre-Revolutionary America:

> It was in this form – as pamphlets – that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. *Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form*.
>
> Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, at 2 (Belknap Press of Harvard University Press, 1967)(emphasis added).

Professor Bailyn further points out that it was in the pamphlet form, "that the best thought of the day expressed itself; it was *in this form that the solid framework of constitutional thought was developed*; it was in this form that the basic elements of American political thought of the Revolutionary period appeared first." *Id.* at 3 (internal citations omitted)(emphasis added).[7]

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[7] Bailyn adds that in the period before the American Revolution was found "the most creative period in the history of American political thought. Everything that followed assumed and built upon its results. In the *pamphlets* published before Independence may be found the fullest expressions of this creative effort. There were other media of communication; but, everything essential to the discussion of those years appeared, if

In light of the essential role of pamphlets in American political and constitutional history, and in light of the thirty-five foot prolife speech exclusion zone at issue here, it is the very definition of irony that Massachusetts and the lower court find no constitutional problem in effectively rendering useless any possible pamphleteering by petitioners or other prolife speakers. Rendering utterly ineffectual today the venerable form of communication that led a majority of Americans in the late eighteenth century to declare independence and eventually adopt the Constitution by appealing to the Constitution is a disregard of history and, more importantly, a fundamental misapplication of key First Amendment principles.

3. The thirty-five foot speech exclusion zone renders useless the protected activity of pamphleteering about the moral issue at the heart of the abortion debate; and, if this Court's decision in *Hill v. Colorado* permits this, *Hill* should be limited or overruled

Whether the issue addressed in a pamphlet is the wisdom of going to war, the morality of the death penalty, the definition of marriage, or, as here, the morality of abortion, thirty-five feet cannot be considered to be a reasonable time, place, or manner restriction when it comes to the constitutionally protected practice of pamphleteering.

To visualize the expansive distance imposed by the challenged statute, one need only imagine a person attempting to offer a pamphlet while standing in the

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not originally then as reprints, in pamphlet form." *Id.* at p. 21 (emphasis added).

window of a three story building, where each story is a typical 10 feet.

In this case where the pamphlets depict the intricacies of human prenatal development, it simply defies logic to conclude that such information can be effectively communicated via the signs, costumes or bullhorns that the lower court relegates to petitioners by way of reasoning that seems to mock collectively speakers who espouse a pro-life viewpoint.[8]

As this Court has recognized, "the sensitive and emotional nature of the abortion controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." *Roe v. Wade*, 410 U.S. 113, 116 (1973). This Court's abortion jurisprudence is replete with the understanding that the practice of human abortion has "profound moral and spiritual implications," *Planned Parenthood v. Casey*, 505 U.S. at 850, and that "men and women of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." *Id.*

Indeed, this Court has recognized that "reasonable people" will differ as to the morality of abortion, *id.* at 853, and that "there are common and respectable

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[8] *See, e.g., McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013) ("Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. When they and their cohorts deem it useful to do so, they congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments. They sometimes don costumes (dressing up as, say, the Grim Reaper).").

reasons for opposing it." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

Given this Court's recognition of the reasonable yet divisive nature of the abortion debate, speech in general, and pamphlets in particular, must certainly be given the greatest protection under the First Amendment. In the present case, the prenatal development information set forth in pamphlets proffered by petitioners is core political speech that is effectively denied to women seeking abortions. In effect, Massachusetts has deprived women seeking abortion of "the right and privilege to determine for [themselves] what speech and speakers are worthy of consideration." *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 899 (2010).

"The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* Therefore, the pro-life speakers, the human development information contained in their pamphlets, and the message that women deserve better than abortion cannot be disfavored as they are by the challenged statute.

For the reasons set forth more fully below, *Amici* urge this Court to adopt, in full or in part, the reasoning in the dissenting opinions of *Hill v. Colorado*, 530 U.S. 703 (2000). If *Hill*'s approval of an eight-foot speech exclusion zone "reflects a most troubling abdication of our responsibility to enforce the First Amendment,"[9] the Massachusetts thirty-five foot zone is flagrantly unconstitutional.

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[9] 530 U.S. at 764 (Scalia, J., dissenting)("bullhorns and screaming from eight feet away will serve the[] purposes well [of those intent on bullying or frightening women]. But those who would accomplish their moral and religious objectives by peaceful and civil means, by trying to persuade individual women of the

B. Massachusetts, by effectively censoring pamphleteering, undermines a key element of this Court's abortion jurisprudence: that the government may not screen information designed to inform women regarding the profound moral issue at the heart of the abortion decision

As explained by Justice Kennedy, this Court's majority opinion in *Planned Parenthood v. Casey* "considered the woman's liberty interest and principles of *stare decisis*, but took care to recognize the gravity of the personal decision."[10] Indeed, Justice Kennedy recognizes that *Casey* stands for the proposition that:

> '[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted."[11]

Justice Kennedy opined that *Hill's* approval of an eight-foot speech exclusion zone "in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-

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rightness of their cause, will be deterred; and that is not a good thing in a democracy.")

[10] *Id.* at 792. (Kennedy, J., dissenting).

[11] *Id.* (quoting *Casey*, 505 U.S. at 852).

foot distance as it can through a peaceful, face-to-face exchange of a leaflet."[12]

1. Petitioners' Pamphlets are Highly Relevant to an Abortion Decision that is "Thoughtful and Informed"

Pamplets that depict prenatal human development present issues that go to the heart of the abortion controversy. That controversy involves a *fact* question of when human life begins as a matter of biology, which is designed to inform a separate but profoundly important *moral* question: whether civilized society should allow the destruction of human beings at the prenatal stages of human life.[13]

Here, the challenged statute operates impermissibly to render useless petitioners' activity of offering pamphlets that address the fact question so that an individual woman can make a meaningful moral judgment that is "thoughtful and informed." *Casey*, 505 U.S. at 872.

The abortion debate is perceived as thorny and confusing, in large part because of the widespread misperception that we do not or cannot know when human life begins. This line of thought commonly claims that the question is a matter of faith or religion,

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[12] *Id.*

[13] Establishing by clear scientific evidence the precise moment at which a human life begins is not the end of bioethics debates. On the contrary, the scientific classification of the subject as a human being is the point from which the debate can and should begin. Richard John Neuhaus, Forward to the white paper authored by *Amici* Maureen L. Condic, Ph.D., *When Does Human Life Begin? A Scientific Perspective*, Westchester Institute (October 2008), at v, *available at* http://www.bdfund.org/white papers (last visited September 12, 2013).

rather than a matter that can be answered by the science of human biology.

The confusion often experienced by women and society in general has its roots in this Court's majority opinion in *Roe v. Wade*, 410 U.S. 113, 159 (1973). That opinion concluded that the Court "need not resolve the difficult question of when life begins," entangling the fact question of human biology with the values question concerning the moral value of unborn human beings:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[14]

Adding to the confusion are misrepresentations often made to women seeking abortion who may be told that pregnancy termination is simply a matter of removing a "clump of cells."[15]

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[14] *Id.*; as recently as the 2000 *Carhart* decision, this Court again seemed to combine the fact and values questions, concluding that "[m]illions of Americans *believe* that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child," *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (emphasis added). As discussed below, the biological humanity of the unborn child is a matter of fact, not subjective belief.

[15] "Before her abortion while three months pregnant, Julie Engel recalls asking an abortion counselor: 'What does a three month fetus look like?' 'Just a clump of cells', she answered matter of factly. Years later she saw some pictures of fetal development. 'When I saw that a three month old 'clump of cells' had fingers and toes and was a tiny, perfectly formed baby, I became really hysterical. I'd been lied to and misled." Monte Harris Liebman, M.D., *Fetal Development Information: An*

The current cultural confusion highlights the importance of the prenatal information pamplets such as those reproduced in the record.[16] By effectively screening the information that can be offered in the speech exclusion zone, Massachusetts and the lower court pay no heed to this Court's recognition that "the woman [may come to] discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood v. Casey*, 505 U.S. at 882.[17]

Essential Element of Informed Consent, Association for Interdisciplinary Research in Values and Social Change, ABORTION DECISION MAKING, 3(1) (Spring 1990)(*available at* http://lifeissues.net/writers/air/air_vol3no1_1990.html)(last visited September 10, 2013).

[16] *See, e.g.*, Exhibit B-1 to the Declaration of Eleanor McCullen, First Circuit Joint Appendix (No. 12-1334) at 224-225.

[17] This Court's concern is validated by a meta-analysis conducted by a research team led by Dr. John M. Thorp, *amicus* herein, concluding that "induced abortion increased the risks for both a subsequent preterm delivery and mood disorders substantial enough to provoke attempts of self-harm. Preterm delivery and depression are important conditions in women's health and avoidance of induced abortion has potential as a strategy to reduce their prevalence." J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OB/GYN Survey 58(1): 67-79 (2003).

See also, M. Gissler, et al, *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, EUR. J. PUBLIC HEALTH, 15(5): 459-463 (October 2005), reporting that women who have aborted their pregnancy have a six times increased risk of suicide compared to women who had a live birth within one year of pregnancy termination (31.9 per 100,000 suicide rate after abortion; 5.0 per 100,000 suicide rate after live birth) such that "elevated risk after a terminated pregnancy needs to be recognized in the provision of health care and social services." *Id.*

Amici urge this Court to take particular note of the fact that decades earlier, Massachusetts had enacted a pre-*Casey* informed consent law that included a 24-hour reflection period, as well as the requirement that the woman acknowledge receipt of an informational document that included "a description of the stage of development of the unborn child." That law, MASS. GEN. LAWS ch. 112, § 12S (1980), was enjoined by *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1981) and no attorney general has sought to re-open the injunction.

Given that Massachusetts does not have in effect a "Woman's Right to Know" informed consent for abortion law,[18] the last and perhaps only chance for women seeking abortion in Massachusetts to inform their moral decision with the facts of biological human development may well be "outside the entrances of abortion facilities."[19]

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[18] "Women's Right to Know" laws are in effect in twenty-five states: AL, AZ, AR, GA, ID, IN, KS, KY, LA, MI, MN, MS, MO, NE, ND, OH, OK, PA, SC, SD, TX, UT, VA, WV, and WI. These laws require abortion providers to provide a pamphlet that informs the woman of fetal development, medical risks and abortion alternatives, accompanied by a reflection period. Seven states require informed consent with no reflection period: AK, CA, CT, FL, ME, NV, and RI. *Informed Consent Laws: Protecting a Woman's Right to Know*, AUL DEFENDING LIFE 2013, *available at* http://www.aul.org/wp-content/uploads/2013/04/Abortion-2_Informed-Consent.pdf (last visited September 10, 2013).

[19] "For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur is outside the entrances to

2. Pamphlets Addressing the Beginning of Human Life are Consistent with Science

Notwithstanding the pluralism of moral judgments about abortion, modern embryology has removed any subjective belief from the fact question of whether an unborn child is a human being. It is this information that petitioners seek to distribute to women via pamphlets that are impermissibly censored by the challenged statute.

The established medical fact that "a unique individual" begins his or her life "at fertilization" is the factual foundation of the petitioners' pamphlets. As stated in one of the most definitive texts used in United States medical schools on the subject of clinical embryology:

> *Human development begins at fertilization* when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to produce a single cell – a zygote. This highly specialized, totipotent cell marked the *beginning of each of us as a unique individual*.[20]

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abortion facilities." *Hill v. Colorado*, 530 U.S. at 763 (Scalia, J., dissenting).

[20] Keith L. Moore and T.V.N. Persuad, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 16 (7th ed. 2003) (emphasis added).

See also, M.L. Condic, *Chapter 3: Pre-implantation stages of human development: the biological and moral status of early embryos*, IS THIS CELL A HUMAN BEING?: EXPLORING THE STATUS OF EMBRYOS, STEM CELLS AND HUMAN-ANIMAL HYBRIDS (2011)(Eds. Antoine Suarez, Joachim Huarte. Social Trends Institute Monograph Series)(Springer, New York, NY):

Of special note is a recent federal district court opinion that expressly relied on a declaration by Maureen L. Condic, Ph.D., *amicus* herein, to find that a required informed consent for abortion statement was based on embryology, and not "ideology":

> Plaintiffs argue that classifying the fertilized egg and subsequent organism as a "human physical life" is an ideological statement that goes to the heart of the abortion debate and is thus impermissible compelled speech. The Commissioner disagrees, framing the statement as a biological truth conveying the fact that post-fertilization, the existing living organism is indeed a 'human physical life.' The Commissioner has some support for its position. Specifically, Maureen L. Condic, Ph.D, a Professor of Neurobiology and Anatomy at the University Of Utah School of Medicine whose primary research focus has been the development and regeneration of the nervous system, testified as follows:
>
> > The unique behavior and molecular composition of embryos, from their initiation at sperm-egg fusion onward, can be readily

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The life of a human being (*i.e.* a human organism) begins at a scientifically well-define moment; the fusion of sperm and egg. Sperm-egg fusion produces a one-cell embryo, the zygote, that is distinct from the gametes in terms of both its molecular composition and its pattern of development. From the instant of sperm-egg fusion onward, the embryo acts in a coordinated, organismal manner to produce and to regulate its own development. All of the actions of the embryo are directed towards producing the structures and relationships required for the ongoing life and health of the embryo as a whole. At no time does the embryo even remotely resemble a mere human cell or collection of human cells.

> observed and manipulated in the laboratory using the scientific method. *Thus, the conclusion that a human zygote is a human being (i.e. a human organism) is not a matter of religious belief, societal convention or emotional reaction. It is a matter of observable, objective, scientific fact.*[21]

In further confirmation that petitioners' pamphlets on fetal development comprise speech on "one of the most basic moral and political issues in all of contemporary discourse,"[22] a group of scientists, developmental biologists, and other prominent scholars likewise found it necessary to make the following statement to affirm the conclusion that a human embryo is indeed a *human being*:

> The embryo is a being; that is to say, it is an integral whole with actual existence. The being is human; it will not articulate itself into some other kind of animal. Any *being* that is *human* is a human being. If it is objected that, at five days or fifteen days, the embryo does not look like a human being, it must be pointed out that this is precisely what a human being looks like – and what each of us looked like – at five or fifteen days of development. Clarity of language is essential to clarity of thought.[23]

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[21] *Planned Parenthood of Ind. v. Comm'r*, 794 F. Supp.2d 892, 916–17 (S.D. Ind. 2011) (emphasis added), *aff'd* 699 F.3d 962 (7th Cir. 2012), *cert. denied*, __ U.S. __, 2013 WL 655224 (May 28, 2013).

[22] *Hill v. Colorado*, 530 U.S. at 768 (Kennedy, J., dissenting).

[23] Ramsey Colloquium, *The Inhuman Use of Human Beings: A Statement on Embryo Research*, 49 FIRST THINGS 17, 18 (1995),

Consistent with our nation's growing understanding of the unchanging science of human embryology, this Court's recent jurisprudence has likewise eschewed its former "potential life" terminology that is often repeated today in the context of the abortion debate.[24]

Indeed, this Court has recognized a state's interest in "protecting the health of the woman and the *life of the fetus*." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. at 846)(emphasis added).

In fact, the *Gonzales* majority used unequivocal language in recognizing that abortion destroys a separate human life when it stated: "It is, however, precisely this lack of information concerning the way in which the *fetus will be killed* that is of legitimate concern to the State." *Id.* at 159 (emphasis added).

And of particular relevance is this quote from this Court's majority in *Gonzales*:

> The Act also recognizes that respect for human life finds an ultimate expression in a mother's love for her *child*. Whether to have an abortion requires a difficult and painful moral decision, *Casey*, 505 U.S., at 852-853, which some women come to regret.
>
> In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.*, at 873. The State's interest in respect for life is advanced by the dialogue that better

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available at http://www.firstthings.com/article/2008/08/001-the-inhuman-use-of-human-beings-23 (last visited Sept. 13, 2013).

[24] *See* n.14, *supra*.

> informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a[n] [] abortion.

Gonzales v. Carhart, 550 U.S. at 159 (emphasis added).

3. The Challenged Statute is Analogous to an Undue Burden on a Woman's Right to Choose

Under this Court's abortion jurisprudence,[25] the Massachusetts law is analogous to an undue burden on a woman's right "to choose to have an abortion . . . without undue interference from the State." *Casey*, 505 U.S. at 846. A right to choose necessarily encompasses the option to forgo the abortion and all of its moral and medical consequences. "And a statute which, while furthering the interest in potential life *or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's *choice* cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877 (emphasis added).

Here, the thirty-five foot exclusion zone operates to hinder a woman's "thoughtful and informed" choice by effectively screening and censoring the information that women could receive from petitioners' pamphlets.

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[25] *Amici* respectfully disagree that abortion is a federal constitutional right. However, to the extent that this Court adheres to the *Casey* undue burden standard, this Court's own language indicates that it must apply equally to all state regulations that relate to a woman's ability to make a thoughtful and informed abortion decision.

While the "undue burden" test is usually applied in the review of legislation where the State aims to protect unborn children, it must be equally applied to "other valid state interest[s]," *id.*, such as Massachusetts's purported interest in peaceful access to "reproductive health clinics." Under the *Casey* standard, the challenged statute's thirty-five foot speech exclusion zone is simply not "a permissible means of serving its legitimate ends." *Id.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the judgment below; furthermore, if this Court's decision in *Hill v. Colorado* permits Massachusetts to censor and screen petitioners' pamphlets, then *Hill* should be limited or overruled.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.,

Respondents.

On A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a state government make standing on the street illegal?

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INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates everyone's fundamental right to be in a public place. One of America's iconic poets, Walt Whitman, once celebrated the egalitarian nature of America's public spaces with these words:

> You road I enter upon and look around, I believe you are not all that is here,
>
> I believe that much unseen is also here.
>
> Here the profound lesson of reception, nor preference nor denial,
>
> The black with his woolly head, the felon, the diseas'd, the illiterate person, are not denied;

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* made a monetary contribution its preparation or submission.

> The birth, the hasting after the physician, the beggar's tramp, the drunkard's stagger, the laughing party of mechanics,
>
> The escaped youth, the rich person's carriage, the fop, the eloping couple,
>
> The early market-man, the hearse, the moving of furniture into the town, the return back from the town,
>
> They pass, I also pass, any thing passes, none can be interdicted,
>
> None but are accepted, none but shall be dear to me.

Walt Whitman, "Song of the Open Road," in *Leaves of Grass* 121 (Signet Classics 2005) (1855).

SUMMARY OF ARGUMENT

Despite appearances, this case isn't about abortion. It's about free speech and an unprecedented attempt by the Commonwealth of Massachusetts to deprive the majority of its citizens of their right to public presence, undermining the equality Whitman praised. Indeed, without the veneer of that particular subject, this case would be easy. If Nazis protesting outside synagogues were the object of this unprecedented law, federal judges would quickly identify the statute as an unconstitutional content-based abridgement of First Amendment rights.

Yet this Court need not even reach the First Amendment issue to decide this case in accordance with the principles of liberty upon which our modern liberal society was founded. There is a philosophically prior fundamental principle upon

which this case can be decided: the right to peaceful presence in public places.

The right to public presence is integral to a free society. It is a right upon which other rights, such as assembly, depend. Although public places can have many rules that circumscribe permitted uses—from anti-loitering laws to park-closure times—these restrictions must be justified against the presumption of equal public access that is inherent in the very term "public property." Massachusetts's law is neither sufficiently justified nor sufficiently tailored to defeat that presumption.

The state recognizes that the effect and intent of its 35-foot "zone of exclusion" has been to restrict the speech and assembly rights of those who wish to picket outside of abortion clinics. The state's argument, accepted by the court of appeals below, is that, while the law *does* restrict free speech, it's a time-place-manner restriction that satisfies intermediate scrutiny under this Court's precedent in *Hill v. Colorado*, 530 U.S. 703 (2000). This logic is flawed, not only because of the petitioner's point that the law is *not* content-neutral, Pet. Br. at 19, but because the legislature made no attempt to restrict the scope of the law. *Hill* was a far narrower law that targeted a specifically problematic behavior pattern.

Yet even if the law passes scrutiny as a time-place-manner regulation, its breadth brings it into conflict with the right to peacefully enter, travel through, and occupy public places. Because the statute significantly infringes on that right—and it hasn't been narrowly tailored to serve a compelling state interest—the law violates the Fourteenth Amendment's protection of substantive due process.

ARGUMENT

I. THE RIGHT TO PUBLIC PRESENCE IS FUNDAMENTAL

The right of public presence can be defined as the freedom of individuals to enter and make use of public spaces and property so long as they do not harm others, or impair their equally peaceful use of the space. This is the right of a parent and child to play catch in a public park, and the right of a Supreme Court justice to stroll outside the court building with his or her clerks while discussing the docket. This is the right of someone to sit on a bench and read a paper, or to simply stand on the sidewalk and appreciate a city's skyline. Public presence protects not just the right of a speaker to stand on a street corner and preach, but of each member of the audience to stand there and listen.

This Court has established three independent but related tests to determine whether a right qualifies for protection under the doctrine of substantive due process. Under the majority's test in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the rights explicitly enshrined in the Constitution cast "penumbras" of protection over secondary rights, which, while not themselves named in the text, must be protected if citizens are to have full and effective enjoyment of those rights that are. A second test, articulated by Justice Harlan II in *Griswold*, holds that the Fourteenth Amendment protects those fundamental rights implicit in our understanding of "ordered liberty." *Id.* at 500 (Harlan, J., concurring). A third test, first articulated explicitly in *Moore v. East Cleveland*, 431 U.S. 494, 500-06 (1977) protects those rights that are "deeply rooted" in the nation's

history and traditions. While it has historically only been necessary for a putative fundamental right meet the standards set by any *one* of these three tests to merit strict scrutiny—and *amicus* takes no position, for purposes of this brief, on which test it believes to be most faithful to the Constitution—the right of public presence clearly satisfies all three.

A. THE RIGHT TO PUBLIC PRESENCE IS PROTECTED BY THE "PENUMBRAS" OF THE BILL OF RIGHTS

The *Griswold* majority, extrapolating from earlier cases where the Court protected rights not expressly mentioned in the Constitution—such as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) ("the right to educate one's children as one chooses") and *Martin v. Struthers*, 319 U.S. 141 (1943) (finding the freedoms of speech and of the press include the right to read, receive, and distribute written materials)—held "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The liberties or "peripheral" rights that fall within those penumbras are granted the same level of protection as the primary rights which they protect and enrich.

Examples given by the *Griswold* majority included the fact that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach—indeed, the freedom of the entire university community.

Without those peripheral rights, the specific rights would be less secure." *Id.* at 483.

But just as the freedoms of speech and of the press would be devalued if these peripheral rights were not protected, the right of an individual to physically *be* in public is a necessary part of the freedoms of speech, assembly, association, and interstate travel. Most obviously, the right of an individual to be in public is a necessary precursor to the right of a *group* of individuals to assemble in public *together*—otherwise, an oppressive state could arrest individuals on their way to a protest, *before* they are "assembled," without violating that constitutional right. *Cf. McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring and dissenting in part) ("To a government bent on suppressing speech, . . . Control any cog in the machine, and you can halt the whole apparatus. . . . Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.").

Similarly, if one doesn't have a right to access and use public places, the state could put conditions on admittance, such as how other "privileges" can be conditioned on acceptance of certain rules and restrictions, including restrictions on speech. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (holding that where the public has no right to enter publicly owned property, the government can condition admission and continued presence on an individual not exercising his First Amendment rights); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (holding that in non-public forums the government can legitimately exclude speakers based

on their political viewpoints); *cf. Rust v. Sullivan*, 500 U.S. 173 (1991) (holding generally that the government can require recipients of discretionary benefits and opportunities to abstain from certain types of First Amendment activity).

The right to speak freely is next to useless if its protected exercise is restricted to private property. In *Aptheker v. Secretary of State*, Justice William O. Douglas wrote that the freedom of movement "often makes all other rights meaningful. . . . Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person." 378 U.S. 500, 520 (1964) (Douglas, J., concurring). This argument applies with equal if not greater strength to freedom of physical presence, which is a *sine qua non* for free movement. And as Justice Douglas hinted, if governments had an unrestricted power to ban individuals, classes, or the entire population from being physically present on public property, they could effectively sentence anyone or everyone to permanent house arrest.

If this Court holds that there is no constitutionally protected right to peacefully be physically present on public property it could create a precedent establishing that those who cannot afford to either purchase or rent private property have no right to physically reside *anywhere*. Such a holding would tacitly endorse a nation-wide campaign by state and local government to effectively criminalize homelessness, a campaign which courts have held violates the constitutional rights of the homeless. In *Pottinger v. Miami*, 810 F. Supp. 1583 (S.D. Fla. 1992), the district court recognized that, because homeless people may have

no other choice but to sleep in public spaces, criminal prohibition severely impairs their ability to travel within cities, between cities, and between states, an argument similar to that which this Court endorsed in *Heart of Atlanta Motel v. United States*, when it recognized that a lack of overnight accommodation effectively restricted the ability of blacks to travel between states. 379 U.S. 241, 257 (1964).

B. THE RIGHT TO PUBLIC PRESENCE IS IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY

In *Palko v. Connecticut*, this Court held that the Due Process Clause protects those fundamental rights and freedoms which are "implicit in the concept of ordered liberty," or "of the very essence of a scheme of ordered liberty." 302 U.S. 319, 325 (1937). While the Court did not define the "concept of ordered liberty," it did say that its content "has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." *Id.* at 328. In *Loving v. Virginia*, "fundamental freedoms" and the "basic civil rights of man" were identified as those "vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. 1, 12 (1967). If these are the characteristics by which the Court defines ordered liberty, Justice Thurgood Marshall was correct when, dissenting from a denial of certiorari, he recognized, in the context of a curfew, that the "freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'" *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 964-65 (1976) (Marshall, J., dissenting from denial of cert.).

This Court in *Loving* called marriage a "vital personal right essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. This is true, but public presence is even more essential. While one can live a happy life without ever marrying—and many do—our everyday lives would completely collapse if we didn't have the right to make reasonable use of public property.

Deeply influenced by classical liberal philosophers, the Framers had a rich appreciation of "liberty" that went beyond freedom from incarceration and embraced a wider conception of free will and autonomy. After breaking away from an oppressive monarchy, they established the Republic as a social compact designed to guarantee its citizens the greatest possible mutually compatible liberty. The basic premise of that compact is that unless an individual's exercise of his natural freedom harms either his peers or the state itself, he is to be free of political and legal restraint. The right to use property owned by nobody, or by everyone in common, in a manner that doesn't deprive others of that same opportunity, is clearly an aspect of the liberty envisioned by the Framers and by Justice Cardozo in *Palko*.

C. THE RIGHT TO PUBLIC PRESENCE IS DEEPLY ROOTED IN THE NATION'S HISTORY AND TRADITIONS

This Court has consistently protected rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Several cases have highlighted the fact that various

aspects of the right to public presence are part of the liberty Americans have historically enjoyed.

In *Hague v. CIO*, the Court noted that the use of public places for the purposes of gatherings and communication "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." 307 U.S. 496, 515-16 (1939). In *United States v. Wheeler*, the Court highlighted the pre-Articles of Confederation roots of the right: "In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, [and] to move at will from place to place therein." 254 U.S. 281 (1920). The Court in *Kent v. Dulles* not only explicitly found the right to be a component of the liberty protected by the Fifth Amendment, it found that its pedigree extends back to Magna Carta and concluded that "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." 357 U.S. 116, 125-26 (1958).

The Court in *Papachristou v. City of Jacksonville* was especially concerned with the importance of the traditional rights to use public spaces:

> these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. *These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be*

> *nonconformists and the right to defy submissiveness*. They have encouraged lives of high spirits rather than hushed, suffocating silence. They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.

405 U.S. 156, 164 (1972) (emphasis added). Moreover, Massachusetts's own supreme court has recognized that the state's Declaration of Rights implicitly guarantees individuals "a fundamental right of free movement" in public. *Commonwealth v. Weston*, 455 Mass. 24, 26 (2009).

Arbitrary zones of exclusion, like the one here, go against the very core of the traditional distinction between public and private property. The right of abortion clinics (or any private-property owner) to bar protesters or any individual from their premises is not in question. But abortion clinics—and abortion clinics alone—cannot be allowed to extend a form of quasi-ownership over *public* property, especially property that constitutes a public forum and has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515. Such a selective extension of the private domain violates not just the trust the government owes to the public but the American tradition of equality before the law. Just as an abortion clinic's licensees (clients and staff) are protected against trespassing charges when they're on the clinic's private property, they are now also

given special rights in the zone of exclusion that aren't extended to any other member of the public.

In the same way that other essential public institutions—like courts and polling stations—must be open on an equal footing to all members of the public, so must public fora. Creating classes of favored or marginalized speakers, or favored or marginalized occupants, is incompatible with the Constitution's guarantee of equal protection.[2]

II. THE STATE'S ASSERTED INTERESTS ARE NOT COMPELLING

At the court below, and in its initial brief before this Court, Massachusetts claimed that the law was justified by the state's "significant" interests in protecting "public safety and patient access to medical care." Resp. Br. in Opp'n to Cert. at i.

In prior cases concerning the limitation of free speech and association rights in proximity to abortion clinics, this Court has noted that states have significant interests "in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen v. Women's Health Ctr.*, 512 U.S.753, 767 (1994), and in

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[2] This point hardly needs support, but one particularly apt precedent come from the Fourth Circuit, which has noted that a law which unevenly restricts or permits access to a public forum based on the identity or affiliation of the speaker cannot rightly be considered a "reasonable time, place, or manner restriction." *Warren v. Fairfax County* 196 F.3d 186,198 (4th Cir. 1999). That court rejected a law which restricted access to a park to residents or employees of Fairfax County, holding that such arbitrary limitations "balkanize" civic dialogue. *Id.* at 199.

protecting patients from "potential trauma . . . associated with confrontational protest." *Hill v. Colorado* 530 U.S. 703, 715 (2000). In this context, not one of these interests provides a compelling reason to restrict the right of Massachusetts citizens to public presence. The passive presence of persons within 35 feet of an abortion clinic doesn't pose a risk to public safety or hinder patient access. Nor does the presence of peaceful protesters or sidewalk counselors—let alone uninterested third parties—unlawfully impair a woman's right to seek an abortion, or cause her trauma.

A. PEACEFUL PUBLIC PRESENCE DOES NOT THREATEN PUBLIC SAFETY OR IMPAIR PATIENTS' ACCESS TO CLINICS

The mere presence of individuals within 35 feet of a clinic doesn't create a threat to public safety. Any argument to the contrary is undermined by the law's exemptions for clinic visitors, staff, government agents, and members of the public using a sidewalk or road for the sole purpose of traveling past the clinic. If a series of pedestrians passing a clinic within the zone of exclusion doesn't pose a risk to public safety, then a single protester, walking back and forth on the same sidewalk while carrying a sign reading "I think abortion is wrong" doesn't either—certainly not to the point where the state can ban anyone who might want to, say, sit on the grass outside a clinic and have a picnic. There's nothing inherently dangerous about human bodies or abortion clinics, or their interaction, that necessitates keeping them at least 35 feet apart.

Massachusetts argues that the law was passed because "protesters regularly barred access to clinics by physically blocking doors and driveways." Resp. Br. in Opp'n to Cert. at 5. Maintaining access to medical facilities can be a compelling state interest, to be sure, but it would only justify a law against blockading clinic access points. The state has not shown—and, due to the fundamental nature of the right at issue, should not be taken at its word in asserting—that standing within 35 feet of a clinic limits physical access to it. *United States v. Carolene Products*, 304 U.S. 144, n.4 (1938) (explaining that there is a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face [to violate a fundamental right]").

While protecting public safety and ensuring access to medical facilities are both recognized as legitimate state interests, this Court has always required not just that the state assert a legitimate interest, but that the law has some rational connection the claimed interest. *Id.* at 153 (holding that legislators must have at least a rational basis for believing a law will further a legitimate end); *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (noting that one purpose of strict scrutiny "is to ensure that the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the [law's] motive was illegitimate"(internal citations omitted)); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding a law unconstitutional because "its sheer breadth [was] so discontinuous with the reasons offered for it"); *Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 441 ("[T]he Equal Protection Clause requires [that a law be] a rational means to serve a legitimate end."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)

(striking down a law because it "further[ed] no legitimate state interest").

There is no clear causal relationship between peaceful (and otherwise lawful) physical proximity to clinics and the circumstances that might pose a safety risk or limit access to them. The state's interest in preventing both those ills cannot justify a law that targets mere physical presence.

B. PEACEFUL PUBLIC PRESENCE DOES NOT UNLAWFULLY RESTRICT WOMEN'S RIGHT TO SEEK MEDICAL CARE AT ABORTION CLINICS OR TRAUMATIZE PATIENTS

Massachusetts claims that some percentage of clinic clients opted not to go through with an appointment and reported "feeling too intimidated by the pacing protesters to enter." Resp. Br. in Opp'n to Cert. at 6. But even assuming *arguendo* that the presence of protesters (or even disinterested third-party observers) did chill a significant percentage of women from seeking abortions (or abortions at a specific clinic), the state simply doesn't have a compelling interest in preventing people from using nonviolent means to discourage behavior they find immoral, or to persuade others to choose between two equally lawful courses of action. Picketing has historically been used as a means of shaming a targeted business, and discouraging potential clients. The fact that a business offers medical care doesn't sufficiently change the nature of the activity to justify the state's involvement. Moreover, *Bray v. Alexandria Women's Health Clinic* established that while a woman's right to choose is protected against

government interference, the Constitution doesn't protect it against *private* encroachment. 506 U.S. 263 (1993). By preventing patients from being exposed to messages that might dissuade them from patronizing abortion clinics, the state violates its obligation to respect the constitutionally protected freedoms of speech, assembly, and public presence

A related justification for the zone of exclusion is the fear that exposure to anti-abortion protesters would traumatize clinic patients. Massachusetts offered no empirical evidence to support this claim, but a study conducted by the University of California at San Francisco found that, of those patients who notice protesters (less than half), 25 percent thought the protesters "a little" upsetting and only 16 percent reported being "quite a lot" or "extremely" upset. The study also found that any distress lasted only a short time, dissipating within a week of the procedure. Diana Green Foster et al., *Effect of Abortion Protesters on Women's Emotional Response to Abortion*, 87 Contraception 81 (2013). The most that can be seriously alleged is that anti-abortion protests might cause patients emotional distress, and even this claim is dubious. The UCSF study showed that those patients who reported a negative response to protests were no more likely to experience "negative" emotions (anger, fear, sadness, regret, guilt, etc.) in connection to their abortion experiences than those who didn't notice the protesters or those who didn't find them emotionally distressing. *Id.* at 84.

Even if *every* clinic patient were emotionally distressed by protests, the state still wouldn't have a compelling reason to ban protesters. That some speech might distress, anger, or offend listeners

doesn't justify its suppression, save in very rare circumstances. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court said the government had a legitimate interest in protecting the targets of protests from intrusive and distressing speech *while they were in their homes*. This is due, the Court said, to the unique nature of the home, noting that "the home is different," and that, *in public*, the burden is on the affected individuals to ignore or avoid speech they find distressing and unpleasant. 487 U.S. 474, 484. Massachusetts's zone of exclusion flips this principle on its head, making it the state's responsibility to protect people in public spaces from possibly distressing speech. In so doing, it conflates public and private spaces, transgressing this Court's settled jurisprudence that draws a distinct line between the two. *See, e.g., Stanley v. Georgia*, 394 U.S. 597 (1969) (First Amendment protects right to private possession of obscene material).

In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court reaffirmed that one doesn't have a right to be sheltered from even hurtful speech while in public places. If the families of dead soldiers must tolerate "outrageous" and hurtful slurs about the deceased *at their loved one's funeral* because the protesters were "on public land next to a public street," *id.* at 9, then the same can be requested of clients seeking treatment at an abortion clinic. As Chief Justice Roberts wrote in that case: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain . . . we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id.* at 15.

III. THE MASSACHUSETTS STATUTE IS NOT NARROWLY TAILORED

Even if any of Massachusetts's asserted interests could be considered compelling enough to justify restricting a fundamental right, the state's total failure to limit the collateral damage caused by the statute would still render the law unconstitutional. Specifically, by targeting *presence* as opposed to *activity* the state has criminalized a wide range of behaviors that don't threaten either public safety or the peace of mind of clinic patients and staff.

Massachusetts also maintains that the 35-foot exclusion zone was only adopted because it was easier to enforce than a prior less-restrictive law modeled after the behavior-restricting (but presence-permitting) statute upheld in *Hill*. Rather than strengthening the state's case, this admission undercuts any claim it can make to narrow-tailoring. This Court's precedents are clear: the fact that a less-restrictive law is more difficult to enforce isn't a defense to a charge of overbreadth under strict-scrutiny analysis. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

In *Frisby*, Justice John Paul Stevens was concerned that a law prohibiting targeted picketing was overly broad because its wide definition of "picketing" covered a fifth-grader standing outside a sick classmate's house with a sign that read "GET WELL CHARLIE" 487 U.S. at 496 (Stevens, J., dissenting). Given that even prohibitions on specific behaviors can be overly broad if drafted imprecisely, a total ban on *all* behavior will clearly sweep in legitimate, constitutionally protected conduct that in no way imperil public safety or the physical well-

being of clinic patients. No reasonable person could believe that a Girl Scout selling cookies, a Salvation Army Santa fundraising, or a busker playing guitar 34 feet from an abortion clinic poses a risk to public safety, yet doesn't at 36 feet. On the other hand, no reasonable person could deny that a group of aggressive protesters mobbing patients, or rocking clinic staff's cars, pose a safety risk *no matter how far they are from the clinic*.

Many statutes specifically prohibit unruly and disruptive behavior outside the 35-foot zone, but Massachusetts has failed to show why such narrowly tailored statutes wouldn't be sufficiently effective within 35 feet. Targeting specifically problematic behaviors—rather than declaring an entire area "off limits" for every conceivable purpose—is not only less invasive and oppressive, but it's also a more effective way of serving the state's asserted interests.

A zone of exclusion will prevent an untold number of people from exercising their constitutionally protected right to peaceful public presence. Relatively few people will move from peaceful communication to illegitimate disruption and violence, yet the actions that do cross that line are already unlawful and subject to criminal or civil penalty, or both. The state draws attention to anecdotal accounts of patients feeling "terrified" or "intimidated" by protestors or, before passage of the new law, being physically prevented from entering clinics. These behaviors clearly threaten public safety, so the state properly recognized them as crimes long before the advent of the statute at issue.

In other words, when intimidation rises to the level of assault or harassment, it's a crime. Touching

another person without their consent is battery, even if it's just to get their attention or to block them from getting past you. And blocking access to medical facilities of any kind is prohibited by the section of Massachusetts's General Laws that directly precedes the law that creates the zone of exclusion. Mass. Gen. Laws ch. 266, § 120(e). The state has long proscribed the use or threatened use of force by private actors to deprive citizens of their protected rights, including the right to have an abortion. Mass. Gen. Laws ch. 265, § 37. Those laws properly target the behavior that the state has a legitimate interest in stopping.

In a democracy, individuals are free to try and persuade one another regarding lawful courses of action without the use of force. Since illegitimate coercion is *already* a crime in Massachusetts, the law creating the zone of exclusion serves only to criminalize legitimate, non-coercive behaviors that are rightly outside the scope of § 37 and § 120(e)—and to infringe upon the right to peaceful public presence. How can a law that only serves to criminalize behavior which is *not* aggressive or harmful—and would not be considered improper two feet farther away—be considered narrowly tailored?

Just as New York City, to deter littering, couldn't forbid anyone but staff and police from entering Central Park or using its serpentine rights of way, Massachusetts can't maintain zones of exclusion that implicate sidewalks and other public areas. These spaces exist to be used and enjoyed by everyone. If specific antisocial and disruptive behavior makes it impossible or dangerous for the general public to use such an area, the appropriate response is to regulate or punish that behavior. Banning the *public* from a

public space to protect them from undesirable or unsafe behavior in that space is like amputating an arm to stop a paper-cut from bleeding. The problem's been solved, but no one could accuse the physician of subtlety or restraint. The occasional problems created by unruly protesters—whether outside abortion clinics, government buildings, or nuclear power plants—call for a scalpel, not an axe.

CONCLUSION

For the reasons set forth above, this Court should reverse the court below and declare the state law unconstitutional.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
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In the

Supreme Court of the United States

ELEANOR McCULLIN, et al.

Petitioners,

v.

MARTHA COAKLEY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the First Amendment permits states to make it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility;"

(2) Whether this Court should overrule *Hill v. Colorado*, 530 U.S. 703 (2000).

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

The Center is vitally interested in preserving the freedom of speech from government censorship as one of the central liberties protected by the Constitution. The First Amendment prohibits laws "abridging the freedom of speech." This includes speech on controversial subjects – indeed; the exchange of views on matters of controversy was the purpose of the free speech guaranty. In our system of government, the people are sovereign and the legislature may not interfere with citizens wishing to speak with other citizens on matters of public importance.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The First Amendment protects a preexisting natural right to hold and share opinions with fellow citizens. The speech guaranty prohibits government from attempting, like Massachusetts seeks to do in this case, to silence citizens *especially* on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" first in their new state constitutions and ultimately in their new federal Constitution.

In this case, Massachusetts not only seeks to silence speech on a matter of controversy, it also seeks to withdraw a portion of the public sidewalks from the public forum. The state relies on this Court's decision in *Hill v. Colorado* for this action. *Hill*, however, stands as an outlier on the issue of speech in a traditional public forum. This Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. Further, this Court has consistently rejected attempts to ban speech in "special areas" of an otherwise open public sidewalk. Sidewalks in residential areas, near schools, in front of this Court, and even near private funerals are among the areas this Court has held to be open for free speech activity. Indeed, this Court has noted that attempts to withdraw the public sidewalks from the public forum as presumptively invalid. In light of *Hill*'s inconsistency with these cases and its inconsistency with the purpose of the free speech guaranty, this Court should overrule *Hill*.

ARGUMENT

I. The First Amendment Was Intended To Protect Citizens' Rights To Share Ideas, Even on Controversial Topics

The State of Massachusetts does not want pro-life advocates speaking to women going to and from abortion clinics.[2] The state did not seek to prevent intimidation, harassment, or even physical interference with access to the clinic. Instead the state bars communication. To accomplish this goal, the state has outlawed all speech activity on a portion of the public side – an area that the Court has found to be a traditional public forum. There is one exception to the state's ban. The law permits employees of the abortion clinic to speak to women on the way to the clinic, presumably because they will communicate the state-preferred message on the subject of abortion. The law prohibits other speech, whether it is labor picketers, political campaigners, or even advocates who wish to inform women of alternatives to abortion.

The state, however, cannot forbid discussion of alternatives to abortion simply because it wishes to promote abortion. Even if the state's purpose is to avoid conversations on uncomfortable or controversial topics, there is no such exception to the free speech guaranty. The First Amendment preserves the natural right to liberty of conscience. That right to one's own opinions, and to share those opinions

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[2] The law euphemistically refers to "reproductive health" facilities, but makes clear that its focus is clinics whose purpose is to ensure that reproduction does not happen and that pregnancies are terminated.

with others, in an attempt to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them.") Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431.

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Understandably, Paine chose to publish *Common Sense* anonymously in its first printing. *See id.* Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both adopted Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S. Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of lib-

erty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. The Pennsylvania Abolition Society was formed in 1775. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. Abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id.* at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery – a position that was highly controversial in many parts of the colonies.

The arguments offered by the abolitionist were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator", "I do not wish to think, or speak, or write, with moderation ... I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

This example of the abolitionist speech activities is one that the current administration highlights as an example of the type of free speech guaranteed by the First Amendment. Adapting a speech by then Assistant Attorney General Thomas Perez given to the Conference on the Transformation of Security and Fundamental Rights Legislation in Kuala Lumpur, Malaysia, the State Department published a pamphlet of its own to tell citizens in other countries about the importance of freedom of speech.[3] *Americans Speak Freely*, United States Department of State, Bureau of International Information Programs, March 2013. Secretary Perez's speech and the State Department pamphlet specifically identify the "writings of abolition pamphleteers" as the type of activity protected by the First Amendment Freedom of Speech. *Id.* at 2-3

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[3] Oddly, however, the State Department's pamphlet asserts that "citizens right to think, believe, pray, write or speak as their conscience dictates" is something that is granted by the government. *Americans Speak Freely*, *supra*, at 2. Such rights are not gifts of government officials, but are instead inalienable and bestowed by our Creator. Declaration of Independence, ¶ 2 (U.S. 1776).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 722 (John P. Kaminski, et al. eds. 2009).

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). North Carolina pro-

posed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION at 18 (Philip B. Kurland & Ralph Lerner eds., 1987). New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention*, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania (John P. Kaminski, *et al.* eds. 2009).

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, *et al.* eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

Congress quickly tested this limit on their power with the enactment of the Sedition Act. The question for the new country was whether the free speech and press guarantees only protected against prior restraint, as was the case in England, or whether they

guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February, 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 ANNALS OF CONGRESS, p. 934 (1794)." *New York Times Co.*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by

an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have that the people intended the First Amendment's speech and press clauses to protect the natural right to share opinions on controversial topics. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

In this case, Massachusetts has rejected liberties the founders included in the Constitution. The state prohibits almost all speech in an area tradi-

tionally open to free speech in order to censor those who wish to discuss alternatives to abortion with women visiting the abortion clinic. As noted, the law does not suppress *all* speech. The statute makes an exception for employees of the abortion clinic. The law permits them and them alone to engage in speech activities outside the abortion clinic. These employees have exclusive access to a particular audience – presumably because the state wishes to support the viewpoint of their message. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Massachusetts has no power, under the Constitution, to silence all that oppose the state's view on abortion. Like the City of Chicago in *Mosley*, the state seeks to discriminate between speakers and messages in area traditionally held open to free speech activities. Here, Massachusetts seeks to overturn *Mosley* or at least limit it to its facts and allow states to discriminate between speakers on the subject of abortion but not on other subjects. As this Court noted in *Mosley*, however, government may not "select which issues are worth discussing or debating" and may not censor speech based on its content. *Id.* at 96.

II. This Court Should Overrule *Hill v. Colorado.*

This Court's decision in *Hill v. Colorado* invited Massachusetts and other states to enact laws similar to the one under review in this case. In *Hill*, this Court ruled that a law prohibiting approaching a

person near an abortion clinic "'for the purpose of ... engaging in oral protest, education, or counseling'" was a content neutral regulation. *Hill*, 530 U.S. at 720-21. The Court stated that the Colorado law did not prohibit a "particular viewpoint." *Id.* at 723. But the Court ignored the clear intent of the law to prohibit anti-abortion messages – an intent made clear by the use of language like "education" and "counseling" that plainly aimed at one, and only one, point of view. Indeed, later in the opinion the Court explicitly recognized that the state has targeted particular messages. The Court noted the state's concession that the law was designed to ensure that women entering an abortion clinic would be free from "unwanted encounters" with people opposed to abortion. *Id.* at 729.

Hill stands as an outlier on the issue of speech in a traditional public forum. As noted below, this Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. Further, this Court has consistently rejected attempts to ban speech in "special areas" of an otherwise open public sidewalk. In light of *Hill*'s inconsistency with these cases and its inconsistency with the purpose of the free speech guaranty, this Court should overrule *Hill*.

Prior to *Hill*, this Court had long recognized that the public sidewalks were held open for speech activity subject only to regulation to ensure that traffic was not impeded. *Schneider v. State of New Jersey*, 308 U.S. 147, 160 (1939). Prior to *Schneider*, the Court ruled that cities could not require a permit to distribute literature on the city streets. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). These

rulings were joined by the decision in *Hague v. CIO*, 307 U.S. 496 (1939), where a fractured Court held that the Free Speech guaranty protected speech activities in public parks and city streets. In his lead plurality opinion Justice Roberts noted: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515 (opinion of Roberts, J.). This Court has repeatedly cited this observation of Justice Roberts as a truism of American constitution law. *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985); *Frisby v. Schultz*, 487 U.S. 474, 481 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Even when the sidewalk or street fronted a "sensitive area," this Court has upheld speech activities on the public areas traditionally open to speech. Thus, while excessive noise in front of schools could be prohibited, peaceful picketing could not. *Compare Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) *with Mosley*, 408 U.S. at 100. Similarly, a city might prohibit picketing on the sidewalk in front of a single house but, as a general matter, the sidewalks of even residential neighborhoods are part of the traditional public forum open to free speech activities. *Frisby v. Schultz*, 487 U.S. at 482-84.

Sidewalks in front of foreign embassies are not off limits to free speech activity. *Boos v. Berry*, 485

U.S. 312, 329 (1988). Even the sidewalk in front of this Court is open to picketers and speakers. *United States v. Grace*, 461 U.S. at 176-80. As this Court noted in *Grace*, public sidewalks are part of the public forum and attempts to withdraw them from that forum are "presumptively impermissible." *Id.* at 180.

Even the most sensitive areas do not qualify as No Free Speech Zones. In *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), this Court struck down a tort judgment against Westboro Baptist Church for its display of particularly offensive signs on a public street outside of a funeral for a fallen soldier. *Id.* at 1217.

The one exception to this line of authority, other than *Hill*, involved a prohibition of campaigning within 100 feet of a polling place on Election Day. *Burson v. Freeman*, 504 U.S. 191 (1992). The plurality opinion upholding the prohibition found the statute narrowly tailored and supported by the compelling state interest in preventing voter intimidation and election fraud. *Id.* at 198-202 (plurality opinion of Blackmun, J.) Justice Scalia concurred in the judgment but on the basis that he believed long-standing restrictions on campaigning near a polling place had withdrawn those areas from the public forum – at least for the brief period of time necessary of the actual conduct of the election. *Id.* at 215-16 (Scalia, J., concurring in the judgment).

The restrictions of the type approved in *Hill*, by contrast, are quite different than the polling place restrictions. The statute in *Burson* did not prohibit all speech, but only prohibited active campaigning. *Id.* at 193-94 (plurality opinion of Blackmun). Where the type of statute at issue in *Burson* had been in ef-

fect in a number of states for nearly a century (*id.* at 215-16 (Scalia, J., concurring in the judgment), the restrictions on speech near abortion clinics are a recent invention. In *Burson*, the restriction was only in place for Election Day. The statute at issue in this case restricts freedom of speech every day of every year.

Hill simply does not fit in, neatly or otherwise, with this Court's prior decisions rejecting speech restrictions on public sidewalks. As Justice Scalia noted in his dissenting opinion in *Hill*, the only possible way to explain the decision is to say it is about abortion, and the Court's decisions on that sensitive subject stand "in stark contradiction of the constitutional principles [the Court applies] in other contexts." *Hill*, 530 U.S. at 742 (Scalia, J. dissenting). There is no basis in the original understanding of the free speech guaranty, however, for an "abortion" exception, or indeed any similar subject matter exception. This Court should overrule *Hill*.

CONCLUSION

The history behind the free speech clause shows an intent to protect the citizen's right to share opinions with other citizens on controversial topics. This is Madison's theory that the people have "a property" in their opinions and their ability to share those opinions.

It does not matter if the opinions at issue are on a matter of controversy. As this Administration notes in explaining the Free Speech guaranty to citizens of other countries, the importance of the right rests in the ability of citizens to move public opinion on matters of intense controversy – like abolition.

Americans Speak Freely, *supra*, at 2-3. It would hardly advance these ideals to say that abolitionist speech is fine in general, but it should not happen anywhere close to an actual slave auction. The value of a free speech guaranty is that allow citizens to go directly to those whose opinion they need to change. States like Colorado (in the *Hill* case) and Massachusetts in this action seek to silence voices of protest in precisely the area where the protest can have an effect.

This is not to say that states cannot prohibit interference or harassment or similar conduct. States may not, however, ban speech on a particular topic.

DATED: September, 2013.

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AMICUS CURIAE BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI*

Amici Curiae[1] are a coalition of organizations that have worked to advance a broad range of civil rights in the United States: Advocates for Youth, Black Women's Health Imperative, California Latinas for Reproductive Justice, Center for Reproductive Rights, Feminist Majority Foundation, Gay & Lesbian Advocates & Defenders, Legal Momentum, Mexican American Legal Defense and Educational Fund, National Advocates for Pregnant Women, National Center for Lesbian Rights, National Coalition on Black Civic Participation's Black Women's Roundtable, National Gay and Lesbian Task Force, National Latina Institute for Reproductive Health, National Organization for Women Foundation, People for the American Way Foundation, and Southern Poverty Law Center. *Amici* have a vital interest in ensuring that the government is able to protect individuals seeking to exercise their fundamental rights from interference by third-parties.

Individual statements of interest of the *Amici* are contained in Appendix A to this brief.

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[1] Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person, other than *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The statute at issue in this case, Mass. Gen. Laws ch. 266, § 120E½ (the "Massachusetts Buffer Zone Law" or "Act"), seeks to secure the safe passage of women and healthcare providers into reproductive healthcare facilities. It is part of a long tradition of government action aimed at safeguarding the exercise of fundamental rights from interference by third-parties. From the Civil Rights Act of 1871 (and its state counterparts), enacted in response to a private campaign of violence and intimidation designed to prevent African-Americans from exercising the rights granted to them by the Reconstruction Amendments, to the Freedom of Access to Clinic Entrances Act of 1994 (and its state counterparts), enacted in response to a private campáign of violence and intimidation designed to prevent women from exercising the right to terminate a pregnancy, all levels of government have long recognized the importance of ensuring that all individuals are able to exercise their fundamental rights without intimidation, obstruction, or injury.

Measures taken by the government to safeguard the exercise of fundamental rights are presumptively valid under the First Amendment as long as they target the conduct of rights-opponents and not their message. Notably, a law does not constitute viewpoint discrimination merely because it has a disparate impact on individuals with a specific set of beliefs. Nor does an individual's viewpoint-based objections to a law render it a form of viewpoint

discrimination. This Court, and the circuit courts, have consistently rejected arguments to the contrary. Were such arguments to prevail, the government would be stymied in its ability to safeguard the exercise of fundamental rights because those seeking to interfere with that exercise are usually motivated by ideology or deeply-held convictions.

The Massachusetts Buffer Zone Law is a presumptively valid means of securing safe passage for women and healthcare providers into reproductive healthcare facilities. The Act is facially neutral because it does not impose burdens or confer benefits on individuals based on the ideas expressed in their speech. To the contrary, the Act, by its terms, regulates non-expressive conduct; it prevents individuals from approaching within 35 feet of a reproductive healthcare facility entrance or driveway. Likewise, the Act has a neutral justification. It is aimed at ensuring the safe passage of women and healthcare providers into reproductive healthcare facilities by preventing people from occupying the space immediately surrounding their entrances and driveways. It does not seek to remedy harms that may arise from the *speech* of abortion-rights opponents, nor does it seek to render such speech less effective.

Given the Court's holding that a content-based, 100-foot buffer zone is a constitutionally permissible means of protecting individuals seeking to exercise a fundamental right from interference by third-

parties, *see Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding the imposition of buffer zones around polling places), it follows that a content-neutral, 35-foot buffer zone is constitutionally permissible, as well.

ARGUMENT

I. LAWS SECURING WOMEN'S SAFE PASSAGE INTO REPRODUCTIVE HEALTHCARE FACILITIES ARE PART OF A LONG TRADITION OF GOVERNMENT ACTION AIMED AT SAFEGUARDING THE EXERCISE OF FUNDAMENTAL RIGHTS FROM INTERFERENCE BY THIRD-PARTIES.

The history of our Nation has entailed the progressive realization of civil rights. At the time of the Founding, many rights that we now take for granted were not recognized, and many groups within our society were denied equal protection of the laws. Over time, the struggle for civil rights has given rise to social movements seeking equal rights for people of color; women; lesbian, gay, bisexual, and transgender (LGBT) people; immigrants; religious minorities; and other communities that have historically been targets of oppression. Although they have achieved many successes, civil rights advocates have also provoked fierce opposition. From school desegregation to women in the military to marriage equality for same-sex

couples, civil rights issues have proven to be intensely controversial. In addition to sparking spirited public debate and legal advocacy, they have also sparked the use of violence, intimidation, and obstruction by those zealously committed to preventing the recognition and exercise of certain rights.

At pivotal moments in our Nation's history, the government has taken action to protect individuals seeking to exercise their rights from interference by third-parties. For example, during Reconstruction, the Civil Rights Act of 1871, 17 Stat. 13 (now codified at 42 U.S.C. §§ 1983, 1985, and 1986), was enacted in response to a private campaign of violence and intimidation designed to prevent African-Americans from exercising the rights granted to them by the Thirteenth, Fourteenth, and Fifteenth Amendments. *See Virginia v. Black*, 538 U.S. 343, 353 (2003). Among other things, the statute creates a civil remedy for private conspiracies to interfere with the exercise of constitutionally-protected rights or liberties. *See* 42 U.S.C. § 1985(3); *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971). Subsequently, Congress enacted criminal penalties for such conspiracies, *see* 18 U.S.C. § 241, and states also outlawed this conduct, *see, e.g.*, Mass. Gen. Laws ch. 12, §§ 11H-11I.[2]

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[2] In addition, Congress has made it a crime to injure, intimidate, or interfere with a person seeking to exercise

In the wake of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the government took various steps to secure safe passage for African-American children into newly integrated schools. *See, e.g.*, Anthony Lewis, *President Sends Troops to Little Rock, Federalizes Arkansas National Guard, Tells Nation He Acted to Avoid an Anarchy*, N.Y. Times, Sept. 24, 1957, at A1 (reporting that President Eisenhower sent federal troops to Little Rock to protect nine African-American students from "[m]obs of pro-segregationists" seeking to obstruct their access to Central High School). These steps included federal court injunctions barring opponents of integration from interfering with access to public school facilities. *See, e.g.*, *Kasper v. Brittain*, 245 F.2d 92, 94 (6th Cir. 1957).

At the height of the Civil Rights Movement, Congress enacted the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). It contains several provisions aimed at ensuring that minorities and women are not denied equal protection of the laws by the actions of private parties. Title II, for example, outlaws discrimination in public accommodations on the basis of race, color, religion, or national origin.

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certain civil rights, 18 U.S.C. § 245, as well as to obstruct someone by force or threat of force from practicing his or her religion, 18 U.S.C. § 247. Several states have followed suit. *See, e.g.*, Mass. Gen. Laws ch. 265, § 37.

See 42 U.S.C. §§ 2000a—2000a-6. Title VII outlaws discrimination in employment and union membership on those bases as well as on the basis of sex. *See* 42 U.S.C. §§ 2000e—2000e-17. Numerous states and localities have adopted similar measures prohibiting discrimination in public accommodations and employment. *See, e.g.*, Mass. Gen. Laws ch. 272, § 98 (public accommodations); Mass. Gen. Laws ch. 151B, §§ 1-10 (employment). Some of these provide greater protections than their federal counterparts, including by expressly identifying sexual orientation as a prohibited basis for discrimination. *See, e.g.*, Mass. Gen. Laws ch. 272, § 98; Mass. Gen. Laws ch. 151B, § 4(1).

Title VII and other civil rights statutes also ban private parties from retaliating against individuals for exercising their civil rights or seeking redress for rights violations. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an individual for opposing a practice made unlawful by Title VII or participating in a proceeding under that statute); 42 U.S.C. § 3617 (prohibiting retaliation against an individual for exercising or encouraging others to exercise rights granted by the Fair Housing Act); 29 U.S.C. § 2615 (prohibiting retaliation against an individual for exercising rights granted by the Family and Medical Leave Act, opposing a practice made unlawful by that statute, or participating in a proceeding under that statute); Mass. Gen. Laws ch. 151B, §§ 4(4)-4(4A) (prohibiting retaliation against an individual for opposing practices made unlawful by Massachusetts' employment discrimination

statute, participating in a proceeding under that statue, exercising rights granted by that statute, or encouraging others to exercise rights granted by that statute); *see generally* Jon O. Shimabukuro *et al.*, Congressional Research Service, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (2013), *available at* http://www.fas.org/sgp/crs/misc/R43045.pdf.

Government has also taken measures to protect individuals seeking to exercise their right to vote from interference by third-parties. The Civil Rights Act of 1957, for example, prohibits voter intimidation. *See* 42 U.S.C. § 1971. The Voting Rights Act of 1965 strengthens that prohibition and provides protection against other polling place abuses. *See* 42 U.S.C. §§ 1973i(a)-(b). In addition, many states have enacted laws that create buffer zones around polling locations to protect voters from intimidation, confusion, and undue influence by political workers. *See Burson*, 504 U.S. at 199-205.

Laws protecting women seeking to enter reproductive healthcare facilities from interference by third-parties are a part of this tradition.[3] Their

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[3] Such laws also serve to ensure that healthcare providers are able to enter reproductive healthcare facilities safely. Of course, without these providers, women would not be able to exercise their rights. *See* Special Rapporteur on the Situation of Human Rights Defenders, *Third Rep. on the Situation of Human Rights Defenders*, ¶ 45, Human Rights Council, U.N. Doc. A/HRC/16/44 (Dec. 20, 2010) (by Margaret Sekaggya)

goal is to ensure that women are not prevented from obtaining constitutionally-protected healthcare services by violence, obstruction, intimidation, harassment, or similar conduct.[4] In 1994, Congress enacted the Freedom of Access to Clinic Entrances ("FACE") Act, 18 U.S.C. § 248, in response to a campaign of violence and obstruction by abortion-rights opponents aimed at abortion providers and women seeking abortion services. The statute prohibits the use or threat of force to injure, intimidate, or interfere with a person seeking to obtain or provide reproductive healthcare services, including abortion services. *Id.*; *see also* California Freedom of Access to Clinic and Church Entrances Act, Cal. Penal Code §§ 423-423.6; N.Y. Penal Law §§ 240.70-240.73.

(noting that "medical and health professionals, by providing sexual and reproductive health services, ensure that women can exercise their reproductive rights"), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-44.pdf.

[4] Under the Due Process Clause of the Fourteenth Amendment, every woman has a fundamental right to terminate a pregnancy before viability. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973). In Massachusetts, as elsewhere, reproductive healthcare facilities provide a wide range of healthcare services to women, including family planning services, treatment of infertility, cancer screening, general gynecological care, and abortion services. *See* J.A. 18, 61, 77. Laws ensuring women's safe passage into reproductive healthcare facilities safeguard not only a woman's right to terminate a pregnancy, but also her ability to access this full spectrum of care.

Federal and state courts have also issued injunctions barring abortion-rights opponents from interfering with access to reproductive healthcare facilities, including through the imposition of buffer zone restrictions. *See, e.g.*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 770 (1994) (upholding a 36-foot buffer zone around clinic entrances and driveways ordered by a state court); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380 (1997) (upholding a 15-foot buffer zone around clinic entrances and driveways ordered by a federal district court). The purpose of buffer zone restrictions is to ensure the safe passage of women and healthcare providers into reproductive healthcare facilities by preventing members of the public from occupying the space immediately surrounding facility entrances. *See Madsen*, 512 U.S. at 769. In addition to buffer zones created by injunction, several states and localities have created buffer zones by statute, like the one at issue here. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a Colorado buffer zone statute).

II. MEASURES TAKEN BY THE GOVERNMENT TO PROTECT THE EXERCISE OF FUNDAMENTAL RIGHTS DO NOT CONSTITUTE CONTENT OR VIEWPOINT DISCRIMINATION MERELY BECAUSE THEIR IMPACT FALLS PRIMARILY ON INDIVIDUALS WITH A SPECIFIC SET OF BELIEFS.

A. A Measure is Content and Viewpoint Neutral if it Regulates Non-Expressive Elements of Speech or Conduct.

Although the speech of civil-rights opponents is entitled to robust protection under the First Amendment, *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (upholding Ku Klux Klan leader's First Amendment right to advocate for violence as a means of social change), it does not follow that the government may not intervene to protect individuals seeking to exercise their fundamental rights from interference by third-parties. Such action is not presumptively invalid merely because rights-opponents are motivated by ideology or deeply-held convictions. Rather, laws designed to safeguard the exercise of rights are presumptively valid as long as they are content and viewpoint neutral. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from

regulation merely because they express a discriminatory idea or philosophy.").

A law discriminates on the basis of content if it either (a) confers benefits or imposes burdens on individuals based on the ideas or views expressed in their speech, or (b) serves a governmental interest related to the expressive content of speech. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643-45 (1994). A law that does neither of these things is content neutral and, by extension, viewpoint neutral.[5] As a result, restrictions on a particular instance of speech are likely permissible when based on the speech's non-expressive elements or accompanying conduct, but not when based on its message.

Thus, the government may prohibit burning draft cards as a means of advancing the government's interest in the effective administration of the Selective Service System because that interest is unrelated to any message that may be conveyed by

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[5] Viewpoint discrimination is a particularly egregious form of content discrimination that occurs when a law imposes burdens on speech based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Although all content-based laws are subject to strict scrutiny, laws that discriminate on the basis of viewpoint are less likely to survive such scrutiny than laws that discriminate on the basis of content alone. *See Burson*, 504 U.S. at 211 (upholding a ban on electioneering within 100 feet of a polling location on election day that was content-based but viewpoint-neutral).

the destruction of a draft card. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968). But the government may not prohibit burning the American flag as a means of preserving the flag's symbolic meaning because that interest depends on the suppression of messages that undermine the flag's symbolism. *See United States v. Eichman*, 496 U.S. 310, 315 (1990); *Texas v. Johnson*, 491 U.S. 397, 410 (1989). Likewise, the government may prohibit all instances of cross burning that constitute true threats because such threats are not protected by the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 362 (2003). But it may not prohibit only those instances of cross burning that are intended to express racial, religious, or gender-based animus because such a prohibition selectively burdens speech based on the message it expresses. *See R.A.V.*, 505 U.S. at 391-92. Similarly, the government may impose a blanket ban on residential picketing to preserve the sanctity of the home because such a ban does not burden or privilege any particular message. *See Frisby v. Schultz*, 487 U.S. 474, 488 (1988). But the government may not selectively ban residential picketing on certain topics. *See Carey v. Brown*, 447 U.S. 455, 462-63 (1980).

It follows, then, that the government may take protective measures to prevent interference with the exercise of fundamental rights provided that those measures are facially neutral and justified without reference to the message of rights-opponents. Indeed, the Court has upheld such protective

measures against First Amendment challenge in numerous cases. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (holding that a Wisconsin statute providing for enhanced penalties when the perpetrator of certain crimes selects the victim on the basis of that person's race, religion, color, disability, sexual orientation, national origin, or ancestry does not violate the First Amendment) ("The Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13-14 (1988) (holding that New York City's Human Rights Law does not, on its face, violate the First Amendment by prohibiting discrimination on the basis of race, creed, color, national origin, or sex by private clubs that provide opportunities for members to engage in professional networking activities with nonmembers); *Bd. of Dirs. of Rotary Int'l v. Duarte*, 481 U.S. 537, 549 (1987) (holding that California's Unruh Civil Rights Act does not violate the First Amendment by requiring California Rotary Clubs to admit women as members); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that Minnesota's Human Rights Act does not violate the First Amendment by requiring the United States Jaycees to admit women as members) ("On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and

permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII of the Civil Rights Act of 1964 does not violate the First Amendment by requiring a law firm to consider a female lawyer for partnership on her merits); *Runyan v. McCrary*, 427 U.S. 160, 176 (1976) (holding that § 1981 does not violate the First Amendment by requiring private schools to admit African-American students); *cf. Kasper*, 245 F.2d at 95 (holding that an injunction prohibiting individuals from interfering with the enforcement of a school desegregation order and picketing a certain high school did not violate the First Amendment). [6]

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[6] In cases where the application of a law would alter a speaker's message, the outcome has been different. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that New Jersey's public accommodations law was unconstitutional insofar as it required Boy Scouts of America to accept gay members because such requirement would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gr. of Bos.*, 515 U.S. 557, 573 (1995) (holding that Massachusetts' public accommodations law was unconstitutional insofar as it required parade organizers to permit a group to march in their parade as a means of expressing a message of gay pride because, in that instance, "the statute had the effect of declaring the sponsors' speech itself to be the public accommodation.").

In some instances, the Court has even upheld protective measures that embody content-based restrictions on speech. In *Burson*, the Court upheld a Tennessee statute that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. *See* 504 U.S. at 193. After finding that this statute was content based because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign," *id.* at 197, the Court held that it nevertheless satisfied the First Amendment as the least restrictive means of serving a compelling state interest, *id.* at 211. Noting the documented history of voter intimidation outside of polling places, the Court concluded that "some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." *Id.* at 206. The Court explained that, when the State is acting to safeguard the exercise of fundamental rights, First Amendment freedoms must be balanced against the other rights at stake. *See id.* at 211; *see also id.* at 213 (Kennedy, J., concurring) ("[T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."). It ultimately concluded that, given the conflict between the right to free speech and the right to vote, "requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." *Id.* at 211.

If a content-based, 100-foot buffer zone is a constitutionally-permissible means of protecting individuals seeking to exercise a fundamental right from interference by third-parties, then *a fortiori*, a content-neutral, 35-foot buffer zone is, as well.

B. This Court Has Consistently Rejected Claims of Viewpoint Discrimination Based on the Disparate Impact of a Facially-Neutral Law That is Justified Without Reference to the Expressive Content of Speech.

A law does not constitute viewpoint discrimination merely because its impact falls primarily on individuals with a specific set of beliefs. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2994 (2010). If it did, the government would be stymied in its ability to safeguard the exercise of fundamental rights because those opposed to such exercise are generally motivated by ideology or deeply-held convictions.

In *Martinez*, the Court held that a public university's policy of prohibiting student organizations that discriminate against prospective members on the basis of their status or beliefs from attaining "registered student organization" status was viewpoint neutral. *See id.* at 2993. The plaintiff organization, which sought to exclude students based on their religion and sexual orientation, had argued that the policy, although neutral on its face,

had a disparate impact on groups whose viewpoints embraced certain forms of discrimination. *Id.* at 2994. The Court decisively rejected this argument, explaining that, because the university's policy was aimed at the harms that flow from the act of exclusion rather than from the expression of discriminatory ideas, it was viewpoint neutral notwithstanding that its impact was felt primarily by individuals with a particular set of beliefs. *Id.* It went on to say that the plaintiff was "simply confusing its *own* viewpoint-based objections to . . . nondiscrimination laws . . . with viewpoint *discrimination*." *Id.* (emphasis in original).

The result in *Martinez* accords with earlier precedent from the Court rejecting claims of viewpoint discrimination based on the disparate impact of a facially-neutral law that is justified without reference to the expressive content of speech. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *O'Brien*, 391 U.S. at 382 (upholding ban on destruction of draft cards despite disparate impact on those seeking to protest the Vietnam War); *accord Norton v. Ashcroft*, 298 F.3d 547, 553 (6th Cir. 2002) (holding that the FACE Act is

viewpoint neutral notwithstanding that most people whose conduct it proscribes are abortion-rights opponents) ("That most of the individuals who are prosecuted under the Act are abortion opponents is irrelevant because there is no disparate impact theory under the First Amendment."); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002) (same); *United States v. Gregg*, 226 F.3d 253, 267 (3d Cir. 2000) (same); *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir. 1998) (same); *Terry v. Reno*, 101 F.3d 1412, 1419-20 (D.C. Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (same); *United States v. Soderna*, 82 F.3d 1370, 1376 (7th Cir. 1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1521-22 (11th Cir. 1995) (same); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 651 (4th Cir. 1995) (same).

Further, where a law is content neutral on its face and is justified without reference to the expressive content of speech, the Court has consistently declined to entertain speculative allegations that the government's asserted interest in the law is a pretext for viewpoint discrimination. *See Turner Broadcasting Sys., Inc.*, 512 U.S. at 652; *O'Brien*, 391 U.S. at 382-84. Instead, it has repeated the "familiar principle of constitutional law that [the] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Turner Broadcasting Sys., Inc.*, 512 U.S. at 652 (quoting *O'Brien*, 391 U.S. at 383).

III. THE MASSACHUSETTS BUFFER ZONE LAW IS A CONTENT- AND VIEWPOINT-NEUTRAL MEANS OF PROTECTING WOMEN SEEKING TO EXERCISE THEIR FUNDAMENTAL RIGHT TO ABORTION CARE FROM INTERFERENCE BY ABORTION-RIGHTS OPPONENTS.

Based on the foregoing principles, the Massachusetts Buffer Zone Law is a presumptively valid means of securing the safe passage of women and healthcare providers into reproductive healthcare facilities. Notably, unlike the Colorado statute at issue in *Hill*, the Massachusetts statute at issue here does not ban speaking or leafleting within a buffer zone; it bans only physical presence.[7]

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[7] Moreover, unlike the Colorado statute, the Act does not prevent abortion-rights opponents from getting close enough to individuals approaching a reproductive healthcare facility to distribute literature or initiate quiet conversations. The Act has no floating buffer zone requirements, and the fixed buffer zones it requires have only a 35-foot radius. In contrast, the fixed buffer zones required by the Colorado statute have a 100-foot radius. *Compare* Colo. Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). Thus, only a small percentage of the area covered by a Colorado buffer zone is covered by a Massachusetts buffer zone. Beyond this area, abortion-rights opponents are free to approach women advancing toward reproductive healthcare facilities at whatever distance is otherwise lawful. Indeed, the record indicates that, notwithstanding the Act, Petitioners have consistently been able to distribute literature to and initiate quiet conversations with individuals approaching all three facilities at issue in this

Compare Colo. Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). Its purpose is to ensure safe passage into reproductive healthcare facilities by preventing members of the public from occupying the space immediately surrounding facility entrances. *Cf. Cox v. Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.")

Contrary to Petitioners' contentions, the Act does not seek to silence abortion-rights opponents or render their speech less effective. It merely seeks to ensure that women and healthcare providers can enter reproductive healthcare facilities safely, without being subject to intimidation, or worse. Of paramount importance, the harms that the Act seeks to prevent do not derive from the persuasive force (whatever it may be) of Petitioners' speech. If a woman is persuaded (as opposed to intimidated) from having an abortion, no harm has occurred in the eyes of the Commonwealth. Rather, the harms that the Act seeks to prevent derive from the physical presence of Petitioners and others in the areas immediately surrounding clinic entrances. Given the overwhelming evidence in the historical record, as well as the specific legislative record in

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case. *See* J.A. 114-15, 117-18, 126, 162-63, 206, 208, 255-56, 259-61, 269-71, 272-73, 306.

this case, that such physical presence has often led to violence, intimidation, and other forms of interference with clinic access, the Act is a constitutionally-permissible means of protecting women's ability to exercise a fundamental right.

A. The Massachusetts Buffer Zone Law is Facially Neutral and Distinguishable From the Colorado Buffer Zone Law at Issue in *Hill*.

The Court has recognized that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broadcasting Sys., Inc.*, 512 U.S. at 642. *Hill* was a difficult case in this regard. The Colorado statute at issue made it unlawful for anyone, within 100 feet of the entrance of any health care facility, to "knowingly approach" within eight feet of another person, without the person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3)).

On one hand, this statute was adopted for a neutral purpose and not "because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791); *see also id.* at 735 (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring) ("The key to determining whether [the statute] makes a content-based distinction between varieties of speech lies in

understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some message, whether or not with the effect of approving or promoting others."). But, on the other hand, the statute's restrictions are triggered by engaging in certain speech. *See id.* at 742 (Scalia, J., joined by Thomas, J., dissenting) ("Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content based. . . . Whether a speaker must obtain permission before approaching within eight feet . . . depends entirely on *what he intends to say* when he gets there.") (emphasis in original); *id.* at 766 (Kennedy, J., dissenting) ("Under the Colorado enactment . . . the State must review content to determine whether a person has engaged in criminal 'protest, education, or counseling.'").

The Massachusetts Act at issue here is distinguishable from the Colorado statute at issue in *Hill* in ways that make the content-neutrality analysis far easier.[8] Critically, the Act is neutral on its face; its requirements are not triggered based on the content of anyone's speech, and government actors need not scrutinize any speaker's message to determine if a violation has occurred. *Compare* Colo.

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[8] As a result, the Court need not consider the continuing validity of *Hill* to decide this case.

Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). The Act simply limits entry into designated buffer zones adjacent to the entrances and driveways of reproductive healthcare facilities, which is a form of non-expressive conduct. *Cf. O'Brien*, 391 U.S. at 375 (noting that there is nothing inherently expressive in the act of destroying a draft card). Those who are permitted to enter the zones are not distinguished from those who are excluded based on the content of their speech. Individuals on their way into or out of a reproductive healthcare facility are permitted to enter a buffer zone, as are facility employees, municipal agents, and tradespeople acting in the scope of their employment. In addition, pedestrians seeking to cross from one side of a buffer zone to another while *en route* somewhere else are permitted to enter. All other individuals—including anti-abortion demonstrators, abortion-rights demonstrators, vendors, solicitors, pickets, and loiterers—are excluded from the buffer zone. Thus, the Act is content and viewpoint neutral on its face.[9]

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[9] Although the First Circuit reviewed the Act under the standard for time, place, and manner regulations, which requires consideration of whether the Act leaves open ample alternative channels of communication, *McCullen v. Coakley*, 708 F.3d 1, 12-14 (1st Cir. 2013), the Act does not directly regulate when, where, or how speech may occur. Rather, it regulates only how near to the entrance of a reproductive healthcare facility a person may approach, "and there is nothing necessarily expressive about such conduct." *O'Brien*, 391 U.S. at 375; *cf. Rumsfeld v. Forum for Academic & Inst'l*

B. The Act Has a Neutral Justification.

Further, the Act serves a governmental interest unrelated to the expressive content of speech. It serves to ensure that women can enter reproductive healthcare facilities safely for the purpose of exercising their rights.[10] *Cf. Madsen*, 512 U.S. at

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Rights, Inc., 547 U.S. 47, 60 (2006) ("As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.") (emphasis in original). Whatever limitations on speech may result from the Act's regulation of physical proximity to facility entrances are merely incidental. As a result, the proper standard for evaluation of the Act's constitutionality is the one set forth in *O'Brien*. *See* 391 U.S. at 376-77 (holding that a regulation of non-expressive conduct that imposes incidental burdens on speech satisfies the First Amendment "if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). An "incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

[10] It also serves to ensure that healthcare providers can enter reproductive healthcare facilities safely, for the purpose of facilitating women's exercise of rights, and to maintain public safety generally by minimizing the risk of violent confrontations outside facilities.

769 ("The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic."). This interference, which historically has taken the form of violence, threats of violence, physical obstruction, intimidation, harassment, and similar scare tactics,[11] does not derive from

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[11] *See, e.g.*, S. Rep. No. 103-117, at 3 (1993) (noting, as part of the legislative history of the FACE Act, that from 1977 through April 1993, more than 1,000 acts of violence against abortion providers and 6,000 clinic blockades and other disruptions were reported in the United States); *Hill*, 530 U.S. at 709 ("[D]emonstrations in front of abortion clinics impeded access to those clinics and were often confrontational.") (footnote omitted); *Schenck*, 519 U.S. at 362-63 ("[Reproductive healthcare facilities in Western New York] were subjected to numerous large-scale blockades in which protestors would march, stand, kneel, sit, lie in parking lot driveways and in doorways. This conduct blocked or hindered cars from entering clinic parking lots, and patients, doctors, nurses, and other clinic employees from entering the clinics. In addition to these large-scale blockades, smaller groups of protestors consistently attempted to stop or disrupt clinic operations. Protestors trespassed onto clinic parking lots and even entered the clinics themselves. . . . Sometimes protestors used more aggressive techniques, with varying levels of belligerence: getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics; or jostling, grabbing, pushing, and shoving women as they attempted to enter the clinics. Male and female clinic volunteers who attempted to escort patients past protestors into the clinics were sometimes elbowed, grabbed, or spit on. Sometimes the escorts pushed back. Some protestors remained in the doorways after the patients had entered the clinics,

expressive elements of speech, but rather from conduct and unprotected "modes" of expression. *See R.A.V.*, 505 U.S. at 386. Indeed, the Massachusetts legislature enacted the statute in response to a substantial factual record documenting threats to public safety in the areas adjacent to reproductive healthcare facilities as well as obstacles faced by women and healthcare providers attempting to enter such facilities. *See, e.g.*, J.A. 26-27, 44, 67, 72-73, 95-96, 122-24 (access to reproductive healthcare facilities impeded by abortion-rights opponents and

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blocking others from entering and exiting."); *Madsen*, 512 U.S. at 758 ("[Abortion-rights opponents] impede[d] access to [a Florida reproductive healthcare facility] by congregating on the paved portion of the street . . . leading up to the clinic, and by marching in front of the clinic's driveways. . . . [A]s vehicles heading toward the clinic slowed to allow the protestors to move out of the way, 'sidewalk counselors' would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 266 (1993) ("Among its activities, Operation Rescue organizes antiabortion demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics."); *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("By the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside [reproductive healthcare facilities]."); John Kifner, *Anti-Abortion Killings: The Overview; Gunman Kills 2 at Abortion Clinics in Boston Suburb*, N.Y. Times, Dec. 31, 1994, at A1 (reporting that a gunman opened fire at two abortion clinics in Brookline, Massachusetts, killing two clinic employees and wounding five other people).

pro-choice counter-protestors gathering in front of their entrances); J.A. 18-19, 21-22, 41, 51, 86 (cars surrounded or otherwise obstructed from accessing reproductive healthcare facility driveways and dropping off patients); J.A. 41, 88-89 (patients attempting to enter reproductive healthcare facilities regularly scared away by the intimidating behavior of individuals gathered in front of facility entrances and driveways); J.A. 12, 16-17, 20 (reproductive healthcare providers harassed and threatened by abortion-rights opponents). Thus, the Act is not only neutral on its face; it has a neutral justification.

C. The Commonwealth Does Not Seek to Suppress the Message of Abortion-Rights Opponents.

Notwithstanding this neutrality, Petitioners contend that the Act is viewpoint based because it has a disparate impact on individuals wishing to express an anti-abortion message. Assuming, *arguendo*, that Petitioners are correct about the disparate impact of the buffer zone restrictions, such impact would not render the otherwise neutral Act a form of viewpoint discrimination. *See supra* at 17-19; *cf. Madsen*, 512 U.S. at 763 ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic.") (emphasis

in origin[illegible] Like the plaintiffs in *Martinez*, Petitioner[illegible]re simply confuse their own viewpoint-based objections to the buffer zone restrictions with viewpoint discrimination.

Finally, there is absolutely no support for the allegation that the Commonwealth's asserted interest in the law is a mere pretext for suppressing the message of abortion-rights opponents. *Cf. Turner Broadcasting Sys., Inc.*, 512 U.S. at 652 ("Appellants' ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon [their] content-neutral character . . . ."). It would be unprecedented for the Court to impute an illicit motive to the Commonwealth for enacting a facially neutral law that serves compelling governmental interests unrelated to the expressive content of speech, *see supra* at 19, especially given that the harms targeted by the Act are so well documented, *see supra* at 26-28 & n.11.

In sum, the Act is a presumptively valid means of safeguarding women's exercise of a fundamental right from interference by third-parties. [12]

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[12] Although this brief does not address the issue of tailoring, *Amici* agree with Respondents that the Act is narrowly tailored to serve the Commonwealth's compelling interests. Further, should the Court conclude that the Act is a time, place, and manner regulation rather than a regulation of non-expressive conduct, *see supra* at 24-25 n.9, *Amici* agree with Respondents

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted.

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that the Act, both on its face and as applied to Petitioners, leaves open ample alternative channels for communication.

Appendix A:
Individual Statements of Interest of *Amici Curiae*

ADVOCATES FOR YOUTH is the only organization that works both in the United States and in developing countries with a sole focus on adolescent reproductive and sexual health. Advocates for Youth believes that all young people have the right to the reproductive and sexual health information, confidential, safe services, and a secure stake in the future. Advocates for Youth envisions a world in which societies view adolescent sexual development as normal and healthy, treat youth as partners in promoting sexual health, and value young people's relationships with each other and with adults.

The BLACK WOMEN'S HEALTH IMPERATIVE (the "Imperative") is the only organization devoted solely to advancing the health and wellness of America's 19.5 million Black women and girls through advocacy, community health and wellness education, and leadership development. The Imperative seeks to improve the health and wellness of Black women by providing health resources and information, promoting advocacy and health policies, and interpreting and issuing reports on relevant research about the health status of America's Black women. We offer our members culturally appropriate tools and information to be an informed and empowered healthcare consumer.

CALIFORNIA LATINAS FOR REPRODUCTIVE JUSTICE ("CLRJ") is a statewide organization committed to honoring the experiences and upholding the rights of Latinas. CLRJ builds Latinas' power and cultivates leadership through community education, policy advocacy, and community-informed research designed to achieve reproductive justice.

The CENTER FOR REPRODUCTIVE RIGHTS (the "Center") is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center's work focuses on ensuring that all women have access to a full spectrum of high-quality reproductive healthcare services. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, and its attorneys have regularly appeared before this Court. As a rights-based organization, the Center has a vital interest in affirming the government's ability to protect individuals endeavoring to exercise their fundamental rights from interference by third-parties. At the same time, the Center places a high value on First Amendment freedoms and has brought litigation in defense of those freedoms on numerous occasions. The law at issue in this case strikes an appropriate balance between respect for First Amendment freedoms and protection of women's reproductive rights.

The **FEMINIST MAJORITY FOUNDATION** ("FMF"), founded in 1987, is the largest feminist research and action organization dedicated to women's equality and reproductive health. FMF's programs focus on advancing the legal, social and political equality of women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and development programs. FMF has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and the federal circuit courts to advance the opportunities for women and girls.

GAY & LESBIAN ADVOCATES & DEFENDERS ("GLAD") is a public interest organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD appeared as counsel in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) and as *amicus* in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), both discussed in the briefing to this Court.

LEGAL MOMENTUM, founded in 1970 and the nation's oldest legal advocacy organization for women, advances the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women's equality.

To this end, Legal Momentum has litigated many cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF") is the leading Latino legal organization in the U.S. focusing on litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 45 million Latinos living in the United States. Protecting the rights of Latina women is at the core of MALDEF's mission. MALDEF monitors federal and state proposed legislation, submits comments on matters that affect the fair and equitable treatment of Latinos, and participates in litigation to further its mission.

NATIONAL ADVOCATES FOR PREGNANT WOMEN is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women. National Advocates for Pregnant Women advocates for reproductive justice including the right to an abortion, the right to decide whether, when and how to carry a pregnancy to term, access to culturally appropriate and evidence-based medical care, and the right to parent the children one bears without inappropriate state intrusion and family disruption.

The NATIONAL CENTER FOR LESBIAN RIGHTS ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that seek to preserve access to reproductive rights and health are upheld and strengthened.

The NATIONAL COALITION ON BLACK CIVIC PARTICIPATION'S BLACK WOMEN'S ROUNDTABLE is an intergenerational civic engagement network of the National Coalition championing just and equitable public policy on behalf of Black women. Founded in 1976, The National Coalition serves as an effective convener and facilitator at the local, state and national levels to address the disenfranchisement of marginalized communities through civic engagement, women and girls empowerment, youth civic leadership development and public policy.

The NATIONAL GAY AND LESBIAN TASK FORCE (the "Task Force"), founded in 1973, is the oldest national organization advocating for the rights of lesbian, gay, bisexual, and transgender ("LGBT") people. As a longtime supporter of women's health and reproductive freedom, the Task Force is concerned about the impact the Court's decision may

have on women's access to constitutionally-protected reproductive health services.

NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH is the only national organization working on behalf of the reproductive health and justice of the 24 million Latinas, their families, and communities in the United States through public education, community mobilization, and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, geography, and discrimination based on gender, race/ethnicity, sexual orientation and gender identity, national origin and immigration status. These circumstances make it especially difficult for Latinas to realize their fundamental human and civil rights, including access to abortion services. Latinas are twice as likely to experience unintended pregnancies as their white peers, making access to abortion care without barriers a priority for Latina health. Therefore, the issues addressed in this case are central concerns to the organization.

The NATIONAL ORGANIZATION FOR WOMEN FOUNDATION ("NOW Foundation") is a nonprofit organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters with chapters in every state and the District of Columbia. The litigation efforts of the

Foundation seek to protect reproductive health options, as well as focus on other areas of concern to women, such as pregnancy discrimination, employment issues, discrimination against women in the military, sexual harassment and exploitation, lesbian and gay rights, civil rights, sex discrimination in insurance, and ending violence against women.

PEOPLE FOR THE AMERICAN WAY FOUNDATION ("PFAW Foundation") is a nonpartisan, citizens' organization established to promote and protect civil and constitutional rights, including the First Amendment right to free speech and the constitutional right to privacy. Founded in 1981 by a group of religious, civil and educational leaders, PFAW Foundation has over 41,103 members and supporters in the Commonwealth of Massachusetts who support a woman's right to reproductive choice. We have frequently represented parties and filed *amicus curiae* briefs in similar cases and are vitally concerned with the threat to reproductive health services posed by this case.

The SOUTHERN POVERTY LAW CENTER ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Founded by civil rights lawyers Morris Dees and Joseph Levin Jr. in 1971, the SPLC is internationally known for tracking and exposing the activities of hate groups and works to ensure that the promises of the civil rights movement become a reality for all. SPLC has pursued litigation and won numerous landmark

legal victories on behalf of the exploited, the powerless and the forgotten. SPLC lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination, including gender discrimination.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,

Petitioners,

vs.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF DEMOCRATS FOR LIFE OF AMERICA AND CLERGY FOR BETTER CHOICES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. We believe that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate our opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. As pro-life Democrats, we share the party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure the equality of opportunity, a reduction in poverty, and the existence of an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

DFLA supports the provision of alternatives to women considering abortion. By far the two most common reasons for having abortions, studies show, are that the woman's life would be dramatically changed by having a child (for example, losing educational or career opportunities) and that she cannot afford a child.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties consented to the filing of this brief, and such consents have been submitted to the Court.

We believe that economic and social factors too often put pressure on women to have abortions, making the decision to abort a "choice" in name only. DFLA was a leading proponent, through its 95-10 Initiative, of reducing abortions through legislation increasing assistance for counseling and child care on college campuses; food and nutrition for pregnant women, mothers and children; adoption services; and other supports. Many such provisions were embodied in the proposed Pregnant Women Support Act, introduced in Congress in 2009, and were enacted in the Affordable Care Act of 2010.[2] Accordingly, DFLA, which supports the free speech rights of pro-life individuals and groups generally, has a special interest in supporting the rights of speakers such as Petitioners, who seek to offer compassionate alternatives to women through quiet, civil conversations, not separated by a 35-foot buffer zone.

Clergy for Better Choices is a network of pastors and church leaders based in urban communities and committed to inform clerics and community leaders about alternatives to abortions along with the health ramifications of abortion. Our mission formed because of the lack of alternative information given to women by abortion providers and the increasing detrimental psychological and physiological results among disproportionately African American women: 52% of all African American pregnancies

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2 See Pregnant Women Support Act (95-10), http://www.democratsforlife.org/index.php?option=com_content&task=view&id=48&Itemid=45f.

end in abortion; African American women make up 12.4% of the population but account for 36% of all abortions. Many of these women are poor or lower middle class and have systemically been offered fewer options, which has resulted in the crucial work of sidewalk counselors. These counselors offer alternatives so that women may make an informed decision about their pregnancy.

SUMMARY OF ARGUMENT

Petitioners are elderly sidewalk counselors, priests, and former doctors dedicated to peacefully advocating alternatives to abortion. On public sidewalks near the entrances to reproductive health clinics, Petitioners seek to engage willing clinic patrons in civil conversations about their pregnancy options. The undisputed record in this case shows that—at least in the past—Petitioners' calm and compassionate advocacy has persuaded "hundreds of women" who "d[id] not want an abortion but fe[lt] that they ha[d] no viable alternative." *See* Petitioners' Br. 9; J.A. 132-33 (McCullen).

However, because of the Massachusetts statute at issue here ("the Act"), Petitioners can no longer engage in these gentle, quiet conversations. If they wish to speak, they must shout from outside the 35-foot buffer zone around abortion-facility driveways. This exclusion imposes unconstitutional costs both on the right of Petitioners to communicate their assistance and on the right of willing women to receive it.

Academic studies, as well as record evidence,

indicate that many women would be receptive to the practical assistance and counseling that Petitioners seek to provide. First, studies indicate that women have abortions for a variety of reasons, most commonly that having a child would dramatically change their life, that they cannot afford a child, or that a partner is unsupportive. Petitioners address several of these problems by offering or informing women about financial support (including food, housing, and health care), parenting training, and other assistance.

Second, studies examining the abortion decision-making process have concluded that a significant number of women obtaining abortions experience ambivalence about doing so, even up to the point of the abortion itself. The evidence also indicates that ambivalent women who request an abortion are more likely to be driven to do so by factors such as personal finances, housing, health care, and lack of parenting training. Again, these are precisely the factors on which Petitioners offer information and support.

It is irrelevant, of course, if the percentage of women visiting the clinic who are receptive to Petitioners' assistance is a minority. Even a small share adds up to thousands of women over time. And more fundamentally, speech to receptive listeners in a public place may not be restricted simply to protect a majority that is unreceptive.

The buffer-zone statute is unconstitutional because, among other things, the alternative channels of communications it permits—shouts, loudspeakers, and signs from a distance—are utterly inadequate for Petitioners' message of care

and support. Petitioners' unrebutted testimony shows that they are able to speak with far fewer women now, and their speech is far less effective in reaching women, than before the Act imposed the buffer zones. Moreover, speech from outside the buffer zones is inadequate not simply because it is less effective. Petitioners and others like them wish to speak on this sensitive matter in gentle, civil, personal conversations. The manner of speech is crucial to their message of caring assistance. They should not be forced into a different mold—in many ways, a stereotyped mold—of a shouting protester.

ARGUMENT

I. INTRODUCTION

The Act challenged here bars Petitioners from engaging in the "close, kind, personal communication" (Petitioners' Br. 9) that is essential to their message of presenting caring alternatives to women seeking abortions. The Act makes it a crime for Petitioners to "knowingly enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility," while exempting all "employees or agents of such facility acting within the scope of their employment." Mass. Gen. Laws, ch. 266, § 120E½. The Act effectively presumes that Petitioners' speech offering abortion alternatives is unwelcome and unwanted—indeed, positively harmful—precisely in the public setting where that speech has proven most effective. Lower courts likewise assumed, in upholding the Act against facial and as-applied challenges, that clinic

patrons have no interest in receiving information about abortion alternatives.[3]

This *amicus* brief dramatizes the extent to which the lower courts erred. The Act skews discussion of this sensitive issue precisely where advocacy and information can have the most impact. A number of well-reputed academic studies confirm that—given the variety of reasons leading women to have abortions—many women would willingly discuss pregnancy options with advocates like Petitioners and, moreover, would benefit from the practical assistance and counseling that Petitioners provide. This evidence confirms the unrebutted testimony in this case that, before the Act, Petitioners were able to persuade a significant number of women to choose the practical assistance they offered instead of abortion.

As Petitioners' brief explains, the Act violates the First Amendment by discriminating on the basis of viewpoint, in a core public forum, without any pretense of narrow tailoring, and forcing Petitioners into inadequate alternative channels of communications such as shouting from outside the buffer zone. *See* Petitioners' Br. 21-52.

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[3] *See, e.g.*, Pet. App. 172a (holding that the Act's exemption for clinic employees was viewpoint neutral because "'the legislature could have concluded that clinic employees are less likely to engage in directing of *unwanted speech* toward captive listeners'") (quoting *McGuire v. Reilly*, 260 F.3d 36, 46 (1st Cir. 2001)); Pet. App. at 49-50a (holding that Petitioners have adequate alternative channels because the fact "that more people don't accept Plaintiffs' offers . . . shows that many members of Plaintiffs' audience are simply *unreceptive* to Plaintiffs' message") (emphases added).

We add that the Act also restricts the ability of willing listeners to exercise their fundamental right to receive information. More than forty years ago, this Court explained that such a right is "fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Bd. of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of . . . political freedom") (emphasis in original). The Act seriously and unjustifiably impedes not only petitioners' right to effectively convey information, but women's right to receive it.

II. ACADEMIC STUDIES, AS WELL AS RECORD EVIDENCE, SUGGEST THAT MANY WOMEN WOULD BE RECEPTIVE TO THE ADVICE AND ASSISTANCE PETITIONERS SEEK TO PROVIDE.

A. Women Have Abortions for a Variety of Reasons, Many of Which Are Addressed by Petitioners' Assistance.

Academic studies show that women have abortions for many interrelated reasons.[4] The variety of reasons undermines any presumption that women seeking abortions are simply unreceptive to the assistance and alternatives that Petitioners offer.

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[4] *See* Rachel K. Jones et al., *More Than Poverty: Disruptive Events Among Women Having Abortions in the USA*, 39 J. Fam. Reprod. Health Care 36 (2012) ("Women have abortions for a myriad of reasons").

A leading study of why women have abortions, conducted in 2004 by Lawrence B. Finer and others at the Guttmacher Institute, surveyed 1,209 abortion patients at 11 large reproductive facilities across the country. In the study, the two most common reasons women cited for abortion were that having a child would dramatically alter their lives (74%) and they "could not afford to have a baby now" (73%).[5] Within the first group, 38% said having a baby would interfere with their education, while another 38% said it would interfere with their current career plans.

Among those pointing to inability to afford a child, the Finer study found, "[t]he most common subreason given was that the woman could not afford a baby now because she was unmarried," cited by 42% of respondents.[6] Of the women citing financial concerns, "34% said they could not afford a child because they were students or were planning to study"; 28% were unable to afford a baby and child care; 23% were unable to afford the basic needs of life; 22% said they were unemployed; and 21% reported that they were unable to quit their job to take care of a baby.[7]

Moreover, a 2012 study conducted by Rachel K. Jones of the Guttmacher Institute and others explored the increasing number of poor women who

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[5] Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110, 110 (2005).

[6] *Id.* at 112.

[7] *Id.*

have abortions in the United States. The Jones study—based on qualitative data from a nationally representative sample of 9,493 women who obtained abortions in 2008—concluded that "many abortion patients make decisions about their pregnancies in the midst of complex life circumstances."[8] The study noted that "[p]oor women are over-represented among abortion patients, and this has been increasing over time. Abortions among poor women accounted for 42% of the 1.21 million procedures performed in 2008, up from 27% of 1.31 million abortions performed in 2000."[9] The Jones study confirms that both financial difficulties and reduced access to health care can "increase . . . women's motivations to terminate [unintended pregnancies]."[10]

Petitioners commonly address such needs with financial support, including food, housing, and health care, and information about such support. For example, Eleanor McCullen and the organizations to which she refers women "offer parenting classes, we offer financial assistance, we help the young women get . . . a WIC,"[11] and "[w]e

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[8] Jones et al., *supra*, at 36.

[9] *Id.*

[10] *Id.* at 37.

[11] WIC is the "Special Supplemental Nutrition Program for Women, Infants, and Children," which "provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk." U.S. Dept. of Agriculture, Woman, Infants, and Children (WIC),

try to help with apartments." J.A. 141. McCullen and her husband have "spent over $50,000 of [their] own money to pay for baby showers, living quarters, furniture, household items, heating oil, electricity, water, telephone, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else was needed by a woman who chose to give birth rather than abort her baby." J.A. 132. Petitioner Jean Zarrella likewise refers women to the same organizations providing access to medical care and housing and other assistance. J.A. 180, 182.

These resources are also relevant to a third major reason why women have abortions: relationship concerns and the desire to avoid single motherhood. Nearly half (48%) of the participants in the Finer 2004 study cited "relationship problems or a desire to avoid single motherhood" as their primary reason for obtaining an abortion. Of those 557 women, 19% said they were not sure about their relationship; 12% said they cannot or do not want to marry their partner; 11% said they were not in a relationship at the time they were pregnant; and another 11% cited the fact that the relationship or marriage may break up soon.[12] Furthermore, the Jones study indicates that 16.2% of the 9,493 participants separated from their partner or husband within a year of deciding to have an abortion,[13] providing corroborating support for the results in the Finer study that a

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http://www.fns.usda.gov/wic.

[12] Finer et al., *supra*, at 113.

[13] Jones et al., *supra*, at 38.

significant number of women have abortions because of relationship difficulties and lack of partner support.

Finally, the results of the Finer study confirm that health concerns, parental influence, rape, and incest account for only a minority of the reasons why women have abortions. According to his survey, possible problems affecting the health of the fetus or the mother were cited as reasons by 14% and 13% of women, respectively. Furthermore, only 6% of respondents cited parental influence, and even fewer—less than 1.5%—identified rape or incest.[14]

B. Studies Suggest that a Significant Share of Women Would Be Receptive to the Practical Assistance and Counseling that Petitioners Provide.

Studies of women's decision-making, as well as the testimony in this case, indicate that a substantial number of women are receptive to the practical assistance and counseling that petitioners provide.

Several academic studies exploring the abortion decision-making process holistically have concluded that a significant number of women obtaining abortions experience ambivalence about doing so, even up to the point of the abortion itself. A 2008 study by Sam Rowlands found that "[a]bout one-quarter of women who undergo abortion have experienced some degree of ambivalence during the

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[14] Finer, et al., at 112-13.

decision-making process."[15] The article continues:

> It is well known that women requesting abortion do change their mind. Change of mind is correlated with the degree of ambivalence. All abortion providers see occasional cases of women backing out at the last moment, even in the anaesthetic room. In a Swedish study of 1,419 women who requested abortion, 1,285 (88%) subsequently went through with an abortion. The remaining 134 chose to continue the pregnancy."[16]

These studies indicate not only the receptivity of some women to reconsidering abortion, but also the factors that might change their decision. For example, the Swedish study just referenced includes the "surprising finding" that women who decided to continue pregnancy were more likely to have cited "partner does not want the baby" as an initial reason for abortion than were those who went through with the abortion.[17] The authors suggest that this result reflects that some women decided to continue pregnancy after the "mandatory pre-abortion clinical interview, where applicants are offered help in solving any social, medical or economic problems they may have"; "[i]t

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[15] Sam Rowlands, *The Decision to Opt for Abortion*, 34 J. Fam. Reprod. Health Care 175, 176 (2008).

[16] *Id.*

[17] Hanna Soderberg et al., *Continued Pregnancy Among Abortion Applicants: A Study of Women Having a Change of Mind*, 76 Acta Obstetricia et Gynecologica Scandinavica 942, 946 (1997).

is possible that the support the counselling is intended to provide may have inspired the women to continue the wanted pregnancy despite the lack of support from the partner."[18]

Likewise, a Danish study of 339 women who were scheduled to receive an abortion within two days found that 30% were still "ambivalent," that is, "still in doubt as to whether their decision to seek an abortion was right for them."[19] The study found that "ambivalent women differ from those without ambivalence with regards to their reason for choosing abortion and their decision-making process": "personal finances and housing conditions influenced the decision significantly more frequently among ambivalent women."[20] Indeed, among ambivalent women who had not previously received information about financial support for mothers and children—unfortunately, nearly half the group—19% said they would have benefitted from such information.[21] And 47% of the ambivalent group said their decision might have changed "if personal circumstances were different"—in most cases, "if the partner had wanted the baby or if personal finances had been better."[22]

These studies belie the district court's

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[18] *Id.*

[19] Charlotte Husfeldt et al., *Ambivalence among Woman Applying for Abortion*, 74 Acta Obstetricia et Gynecologica Scandinavica 813, 814 (1995).

[20] *Id.* at 816, 814.

[21] *Id.* at 815.

[22] *Id.*

suggestion that women are simply unreceptive to Petitioners' assistance and counseling. The studies confirm the importance of allowing open channels of communication during the decision-making process, even at late stages. Even the Rowlands article, which opposes government-mandated counseling and argues that many women make their decision early, concludes that "[a]ll women need evidence-guided information in order to make a fully informed decision," as well as "a sympathetic and supportive milieu" when debating whether to undergo abortion.[23]

Preserving opportunities to receive information is important for the emotional health of a significant subset of women. The Danish study, citing other surveys, notes that "[i]t has been found that ambivalent women run a greater risk of suffering negative emotional sequelae, such as depression and guilt," after an abortion.[24] This case involves simply private speech providing information about abortion alternatives, but this Court's statement concerning state-mandated information is relevant: Information about alternatives "ensure[s] an informed choice" and helps "reduc[e] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood v. Casey*, 505 U.S. 833, 882-83 (1992).

As we have already noted, Petitioners provide the kind of alternatives and support to which some

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[23] Rowlands, *supra*, at 178.

[24] Husfeldt et al., *supra*, at 813.

women, especially those ambivalent about the decision to abort, are receptive. Petitioners provide information about assistance with personal finances, housing, nutrition, health care, and parenting training, in addition to providing some of this support directly themselves. See *supra* pp. 9-10. They go to great lengths to provide their assistance in a compassionate way. For example, McCullen includes a card with her home phone number as part of the literature she distributes. Women call her home frequently and, in a caring, non-judgmental manner, she talks to them and listens to "whatever they want to speak about." J.A. 136, 143.

It may be conceded that many women, even a significant majority, are not seeking alternatives to abortion by the time they visit a clinic.[25] But for several reasons, that is no reason to conclude that Petitioners' speech is not being burdened, or that burdening their speech is permissible.

First, even a minority of receptive women amounts to a large number over time and multiple locations. Massachusetts had approximately 23,000 to 24,000 abortions per year in 2008 and

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[25] *See, e.g.*, Ann M. Moore et al., *What Women Want from Abortion Counseling in the United States: A Qualitative Study of Abortion Patients in 2008*, 50 Social Work in Health Care 424, 431-32 (2008) ("45 of the 49 respondents [92 percent] reported that they had made up their mind to have the abortion before they called the clinic where they were getting their procedure"); *see also* Rowlands, *supra*, at 175 ("A small study of Californian women having a pregnancy test showed that 78% had already decided on the outcome of a pregnancy, if this were to be confirmed.").

2009, the most recent years for available data.[26] If 30 percent of those women were still ambivalent just before the abortion, as in the Danish study—and were particularly open to hearing information about financial support—Petitioners and others like them might reach as many as 7,000 receptive women a year in Massachusetts alone. If the number is 12% (the number in the Swedish study who requested an abortion but decided at the last minute to continue the pregnancy), or even as low as 8% (see studies *supra* n.25), Petitioners and others like them could still reach 1,800 to 2,800 receptive women yearly in the state. Such estimates fit the experience of Petitioners. Zarrella testified that she had successful interactions with more than 100 women before the Act (J.A. 175, 180); McCullen testified that many women told her "they do not want an abortion but feel they have no viable alternative," and before the Act she persuaded one woman a week on average to go with her to receive assistance (J.A. 132-33, 140). Extrapolating across the nation, where 1.21 million abortions were performed in 2008 (the most recent reliable data), even an 8% figure would amount to 96,000 women who were unsure about their decision to obtain an abortion and may have

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[26] Karen Pazol, PhD, *et al.*, Centers for Disease Control, Abortion Surveillance – United States, 2009, Table 3 (Nov. 23, 2012), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm?s_cid=ss6108a1_w (22,945 abortions reported in 2009) (last visited Sept. 11, 2013); Guttmacher Institute, State Facts About Abortion: Massachusetts (July 2013), available at http://www.guttmacher.org/pubs/sfaa/massachusetts.html (24,900 abortions in 2008) (last visited Sept. 11, 2013).

benefitted from additional education or consultation.

More fundamentally, whether or not women who are unsure or receptive constitute a minority is legally irrelevant. The government cannot restrict speech to a receptive minority in a public place such as a sidewalk in order to shield an unreceptive majority from the speech. To allow such a basis for restriction would create a blueprint for marginalizing unpopular speech. *See, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971) (government may not "shut off discourse solely to protect others from hearing it" unless "substantial privacy interests are being invaded in an essentially intolerable manner"). The restriction may only be upheld when it is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves the speaker ample alternative means of communication. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). We agree with Petitioners not only that the Act violates content-neutrality and narrow tailoring, but also that speaking from outside the 35-foot buffer zone is an utterly inadequate alternative channel.

Petitioners' unrebutted testimony shows that they are able to speak with far fewer women now than before the Act imposed buffer zones, and that their speech is less effective in reaching women. *See* Petitioners' Br. 11-13 (summarizing evidence). This evidence fits with the common-sense recognition that "direct one-on-one communication" is "the most effective [and] fundamental . . . avenue of political discourse."

Meyer v. Grant, 486 U.S. 414, 424 (1988).

Finally, speech from outside the buffer zone is inadequate not simply because it is less effective. Petitioners and others like them wish to speak on this sensitive matter in quiet, civil conversations, "with a kind, gentle voice, and with eye contact." J.A. 133 (McCullen). Quite apart from their ultimate results, loudspeakers and shouts generally, as Jean Zarrella put it, "are not conducive to conveying my message of kindness, love, hope, and help." J.A. 179. Petitioners' own understanding of their role makes their manner of speech important. They should not be forced into a different mold—in many ways, a stereotyped mold—of a shouting protester.

CONCLUSION

All studies show that the decision to have an abortion is not one that is taken lightly or made without thoughtful consideration. The practical assistance that Petitioners provide to clinic patrons helps ensure that women make this decision with knowledge of all the resources and information available to them. The Act's free-speech exclusion zone harms willing listeners by depriving them of the opportunity to speak with Petitioners and with others offering assistance.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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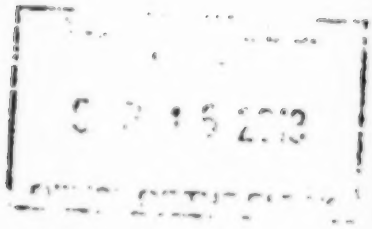

No. 12-1168

In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents ... acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

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No. 12-1168

In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

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MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended First Amendment freedoms against local, state, and federal encroachment. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adhering to the Constitution as

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; *amicus* has lodged the parties' written consents with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The Petitioners are peaceful "sidewalk counselors" who seek to counsel or pass leaflets to women who approach abortion facilities in Massachusetts. The challenged law – chapter 266, Section 120E½ of the Massachusetts General Laws (the "Act") – criminalizes the Petitioners' conduct.

Constitutional Background

The First Amendment protects freedom of speech from content- and subject-matter based restrictions imposed by government. *Carey v. Brown*, 447 U.S. 455, 489 n.6 (1980). In addition, public streets and parks are "held in trust for the use of the public" for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (citations and interior quotations omitted). In these "traditional public fora," the government may impose "[r]easonable time, place, and manner restrictions ..., but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest and restrictions based on viewpoint are prohibited." *Id.* (citations and interior quotations omitted).

Statutory Background

Subsection (b) of the Act makes it criminal to "knowingly enter or remain on a public way or sidewalk adjacent to" a non-hospital abortion facility "within a radius of 35 feet of any portion of an entrance, exit or driveway ... or within the area

within a rectangle created by extending the outside boundaries of any entrance, exit or driveway ... to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway." The Act exempts "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment."

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts as stated by the Petitioners' brief. *See* Opening Br. at 3-19.

SUMMARY OF ARGUMENT

As the Petitioners argue, Massachusetts drafted a content-based restriction on speech in public fora and did not narrowly tailor the Act to the ills that the Commonwealth sought to address. For those reasons, the Act is unconstitutional. *See* Section I, *infra*. In deciding this case, the Court also should revisit *Hill v. Colorado,* 530 U.S. 703 (2000), which upheld a similar type of law from Colorado, based on a perceived "right to be left alone" even in a public forum, as well as various abortion-specific departures from otherwise-controlling constitutional doctrines. *Amicus* Eagle Forum respectfully submits that the Court should revisit and reverse *Hill* for two primary reasons.

First, factual and legal developments since 2000 compel this Court to revisit *Hill*. Factually, it has become clear that the abortion industry opposes the disclosure of various negative effects correlated with abortion that have come into focus since 2000. For liberal states like Massachusetts that are politically unlikely to regulate the abortion industry as allowed

under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), private-sector action by the Petitioners in the public square may be the only chance that some women have to hear the other side of the abortion issue. *See* Section II.A.1, *infra*. Legally, this Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007), marks an important departure from what Justice Scalia's *Hill* dissent called the Court's "ad hoc nullification machine" and its "whatever-it-takes proabortion jurisprudence," *Hill*, 530 U.S. at 741, 762 (Scalia, J., dissenting), under which the Court adopts abortion-specific exceptions for otherwise-applicable doctrines and then renders a pro-abortion ruling. *See* Section II.A.2, *infra*.

Second, if *Gonzales v. Carhart* indeed marks an end to the Court's treating abortion issues as exceptional, then decisions like *Hill* cannot stand. When it reviews *Hill*, the Court will find that abortion protections imposed on the entire field of medicine are overbroad, and abortion protections imposed only on the abortion context are not content-neutral. Either effort would violate the First Amendment. The Court also should confirm that there is no "right to be left alone" in public under the First Amendment. *See* Sections II.B.1-II.B.3, *infra*.

ARGUMENT

I. THE ACT IS UNCONSTITUTIONAL AS NEITHER NARROWLY TAILORED NOR CONTENT NEUTRAL

The Act singles out all abortion facilities, throughout the Commonwealth, regardless of whether a facility had experienced problems. For the

reasons argued by the Petitioners (Opening Br. at 22-45), the Act violates the First Amendment, both because Massachusetts did not tailor the Act narrowly and because the Act is not content-neutral. *Amicus* Eagle Forum supports the Petitioners' cogent arguments on the Act's unconstitutionality. The Act implicitly relies on the *Hill* finding of a "right to be left alone" even in a public forum, which requires this Court's revisiting *Hill* in this case.

II. THIS COURT SHOULD OVERTURN *HILL*

As Justice Scalia explained in his *Hill* dissent, the *Hill* decision relies on several instances of the majorities' simply declining to apply otherwise-applicable doctrines of constitutional law in the abortion context:

> None of these remarkable conclusions should come as a surprise. *What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.*
>
> ...
>
> Does the deck seem stacked? You bet. As I have suggested throughout this opinion, *today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years.* Today's distortions, however, are particularly blatant.

Hill, 530 U.S. at 741, 764-65 (citations omitted, emphasis added) (Scalia, J., dissenting).[2] *Amicus* Eagle Forum respectfully submits that subsequent factual and legal developments preclude this Court's reflexively applying *Hill* to the Act here.

In any event, under the Due Process Clause, "[i]n no event ... can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998). Similarly, with respect to *stare decisis*, courts can apply their precedents so conclusively as to violate due process. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). Significantly, this Court has never relied on the First Amendment analysis in *Hill*,[3] which undercuts its precedential value. Under the circumstances, *amicus* Eagle Forum respectfully submits first that the Court must reconsider *Hill* before applying it to defend the Act here, and second that reconsidering *Hill* would require overturning it.

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[2] The doctrinal distortions to which Justice Scalia refers include selectively neutering the doctrines of narrow tailoring and overbreadth, *Hill*, 530 U.S. at 762, ignoring content-based regulation of speech, *id.* at 746-47, and inventing a "right to be left alone" in a public forum, *id.* at 754.

[3] Majorities cited *Hill* for non-controversial propositions on vagueness in *U.S. v. Williams*, 553 U.S. 285, 304 (2008), and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010), but the other three instances of this Court's citing *Hill* were in dissent. *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting); *id.* at 978 (Kennedy, J., dissenting); *Virginia v. Black*, 538 U.S. 343, 399 (2003) (Thomas, J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 485 n.2 (2010) (Thomas, J., concurring in part and dissenting in part).

A. Factual and Legal Developments Have Undermine the Case for Exempting Abortion from Constitutional Norms

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). When justification is present, however, "we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). There are both factual and legal reasons for revisiting *Hill*.

1. The Abortion Industry Needs the Regulation that Petitioners Provide

One of the bases for this Court to reject *stare decisis* and revisit an issue is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. Several factual issues have come into focus in the intervening decade-plus that undermine *Hill*. Equally important, as Justice Kennedy explained in dissent, *Hill* undid the balance that this Court struck in *Casey* not only for the opponents of abortion whom *Hill* left without recourse, *Hill*, 530 U.S. at 791 (Kennedy, J., dissenting), but also for the women considering an abortion – whom the Court *allowed*, but did not *require*, states to protect from the abortion procedure itself. *Casey*, 505 U.S. at 878. In reliably liberal, reliably Democratic states like Massachusetts, where politicians would never challenge the abortion industry's orthodoxy, the Petitioners represent the

only real hope that some women contemplating an abortion will hear both sides of the issue. Since this Court has taken the mantle of the nation's legislator on issues having to do with abortion, it is up to this Court to ensure that women have at least a chance to get the full debate when their states decline to exercise the option to enter the fray.

As a factual matter, the problem with speech restrictions under *Hill* has gotten worse since 2000, based on accumulating known – but generally not disclosed – medical risks correlated with abortion:

- Abortion correlates with significant increases in suicide risk compared with both birth mothers and the general population. D. Reardon *et al.*, *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95:8 So. Med. J. 834-41 (2002).
- Women who undergo elective abortions have higher incidence of mood and anxiety disorders than either the general population or women who deliver children. David M. Fergusson *et al.*, *Abortion and mental health disorders: evidence from a 30-year longitudinal study*, 193 Brit. J. Psychiatry 444-51 (2008); Reardon *et al.*, *Record Linkage Study*, 95:8 So. Med. J. at 834-41.
- Women who undergo elective abortions have higher incidence of substance abuse than either the general population or women who deliver children. Priscilla K. Coleman *et al.*, *Induced abortion and anxiety, mood, and substance abuse disorders: Isolating the effects of abortion in the national comorbidity survey*, 43 J. Psychiatric Res. 770-76 (2009).

- Prior abortions correlate with increased risk of premature births in later pregnancies, including a significantly elevated risk (64 percent) of "very preterm" births prior to 32 weeks gestation. Jay D. Iams *et al.*, *Primary, secondary, and tertiary interventions to reduce the morbidity and mortality of preterm birth*, 371 THE LANCET 164-75 (Jan. 2008); Hanes M. Swingle *et al.*, *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses*, 54 J. REPRODUCTIVE MED. 95-108 (2009); Institute of Medicine, *Preterm Birth: Causes, Consequences, and Prevention*, 519 (National Academy of Science Press, July 2006) (listing abortion as an immutable risk factor for preterm birth).[4]
- Induced abortions correlate with significantly increased breast-cancer risk. Kim E. Innes, Tim E. Byers, *First Pregnancy Characteristics & Subsequent Breast Cancer Risk Among Young Women*, 112 INT. J. CANCER 306-11 (2004). Significantly, the physiology of why abortion increases the risk of breast cancer is well-understood, but nonetheless minimized or suppressed, apparently for political reasons. *See* Angela Lanfranchi, M.D., *The Federal Government and Academic Texts as Barriers to*

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[4] Significantly, among very preterm newborns, the risk of cerebral palsy increases fifty-five fold (5500 percent) vis-à-vis full-term newborns. E. Himpens *et al.*, *Prevalence, type, and distribution and severity of cerebral palsy in relation to gestational age: a meta-analytic review*, 50 DEVELOPMENTAL MED. CHILD NEUROLOGY 334-40 (2008).

Informed Consent, 13:1 J. AM. PHYSICIANS & SURGEONS 12, 13-15 (Spring 2008).

Far from disclosing these risks, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health risks that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (opposition to South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. Leblanc*, __ F.3d __, 2013 U.S. App. LEXIS 18423 (5th Cir. Sept. 4, 2013) (No. 12-30456) (opposition to Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Although the abortion industry's lack of transparency calls out for heightened regulation, vis-à-vis other, less politicized medical practices, states with relatively liberal political establishments are unlikely to do so. Indeed, in the aftermath of the horrors revealed by the prosecution of abortionist Kermit Gosnell, Democrats lionized a Texas state senator for *opposing* legislation designed to prevent similar practices in Texas. Manny Fernandez, *"In Battle Over Texas Abortion Bill, Senator's Stand Catches the Limelight,"* N.Y. TIMES, at 18A (June 26, 2013); Ross Ramsey, *"Democrats Look To Wendy Davis As the Charm,"* N.Y. TIMES, at 25A (Aug. 10, 2013). Massachusetts is unlikely to impose new regulations on leading backers of its ruling party.

Perhaps due to the abortion issue's politicization in the United States – caused in great part by this Court's unprecedented *Roe* decision – the abortion

industry appears to regard itself more as civil-rights warriors than as medical providers. As such, many abortion providers apparently believe that they simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis*, ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted). Against this backdrop of increasingly understood risks from abortion and no challenges to the abortion industry from states with liberal political establishments, the Petitioners represent one of the few chances for Massachusetts women who are contemplating abortion to experience the benefits of an open society.

2. *Gonzales v. Carhart* Ended Abortion's Exemption from Constitutional Norms

Another reason for the Court to revisit an issue, notwithstanding *stare decisis*, is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855. Although the many distortions of constitutional doctrines cited by Justice Scalia's *Hill* dissent have undoubtedly clouded this Court's abortion cases, *see Hill*, 530 U.S. at 741, 746-

47, 750, 754, 762, a subsequent abortion decision rejected treating abortion as exceptional:

> The law need not give abortion doctors unfettered choice in the course of their medical practice, *nor should it elevate their status above other physicians in the medical community.* ... [¶] Medical uncertainty does not foreclose the exercise of legislative power in the abortion context *any more than it does in other contexts.*

Gonzales v. Carhart, 550 U.S. 124, 163-64 (2007) (emphasis added). That holding about "abortion doctors" and the "abortion context" applies equally to *abortion patients* (*i.e.*, the very women that the Act misguidedly attempts to protect from the Petitioners' attempts to communicate with those same women). If *Gonzales v. Carhart* signals the end of abortion's "ad hoc nullification machine" and the Court's "whatever-it-takes proabortion jurisprudence," *Hill,* 530 U.S. at 741, 762 (Scalia, J., dissenting), this Court should now apply standard constitutional doctrines in its abortion cases. *Hill* cannot survive that inquiry.

B. This Court Needs to Unwind the Pretzel Logic that Underlies *Hill*

As signaled by the *Hill* dissents and highlighted by the Petitioners' citation to Professor Tribe, this is not a difficult case:

> I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.

Opening Br. at 54 (*quoting Symposium,* 28 PEPP. L. REV. 747, 750 (2001) (Prof. Laurence H. Tribe)

(Petitioners' alteration). To the extent that there is difficulty, it lies in the *Hill* majority's bending First Amendment doctrines to fit the desired outcome. In a very real sense, *Hill* is too convoluted for this Court to narrow. It would be considerably easier to consider *Hill* as a misguided anomaly and overrule it – for the reasons stated in Section II.A, *supra* – than to attempt to reconcile it with the otherwise-prevailing norms of First Amendment jurisprudence.

1. *Hill* Is Inconsistent with *Casey*

As Justice Kennedy explained, *Hill* defeats the balance struck in *Casey* by denying abortion opponents access to the public square, given that *Casey* essentially precluded legislative redress for many aspects of the abortion debate. *Hill*, 530 U.S. at 791 (Kennedy, J., dissenting). *Hill* is even further out of balance with *Casey*, which held that states may insert themselves into a physician's office to require disclosures "to ensure that the woman's choice is informed," even if she does not want to see or hear the disclosure. *Casey*, 505 U.S. at 878. Against that backdrop of permissible intrusion into a private setting (namely, a physician's office), it is puzzling that the Court would see the need to invent – for the first and only time – a "right to be left alone" in a purely public forum.

2. Failing to Tailor Speech Restrictions Produces Measures that Are Unlawfully Overbroad

Although a narrowly tailored measure need not be the least-restrictive alternative, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989), it must nonetheless "be specifically and narrowly framed to

accomplish [an appropriate governmental] purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). In *Hill*, as chronicled in Justice Scalia's dissent, the majority's position evolved in response to Justice Kennedy's dissent to acknowledge taking a "bright-line prophylactic" approach to restricting speech, *Hill*, 530 U.S. at 761-62 (Scalia, J., dissenting), notwithstanding that "[b]road prophylactic rules in the area of free expression are suspect," and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)). This Court should reject as hopelessly inconsistent any effort broadly to regulate speech as a means of bestowing perceived benefits on a favored industry.

3. Tailoring Speech Restrictions Produces Measures that Are Non-Neutral and Content-Specific

The problem facing abortion-friendly restrictions on speech is that once the legislature cures its over-breadth problem, it finds itself hopelessly ensnared in an even-worse content-specific problem:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

Carey, 447 U.S. at 489 n.6; *see also id.* at 461-62 (1980) ("Equal Protection Clause mandates that the [speech-discrimination] legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"). Thus, whether the

proposed restriction would allow the pro-abortion side a free pass or, instead, would quash the entire subject of abortion (*i.e.*, both sides of the debate), the result is essentially the same. This is because "restriction[s] on expressive activity because of its content ... would completely undercut the profound national commitment to ... uninhibited, robust, and wide-open" debate. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). This Court should make clear to the abortion industry and its political allies that their cause provides no basis for abandoning the foundational freedoms enshrined in the First Amendment.

In summary, the First Amendment does not allow abortion-specific restrictions on speech, and it does not allow overbroad restrictions on speech. That the abortion industry and its political allies cannot restrict speech in the manners that they would like is not a bad thing. Debate is good, and they may learn something. Certainly, their patients will.

CONCLUSION

For the foregoing reasons and those argued by the Petitioners, this Court should reverse the lower courts and overturn *Hill*.

September 16, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEF

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In The

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, AND ERIC CADIN,

Petitioners,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF 40 DAYS FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae 40 Days for Life is a community-based campaign that draws attention to the harms of abortion. Set during a 40-day time period in numerous cities throughout the United States, the most visible component of 40 Days for Life is a constant prayer vigil outside locations where unborn children are aborted. Participants pray and fast outside abortion clinics 24-hours a day during that 40-day time period. The most recent 40 Days for Life campaign was conducted in 238 communities in the United States. More than 80,000 people participated worldwide. In Massachusetts, six cities and approximately 1,900 people participated. 40 Days for Life seeks to inform women seeking an abortion that there are better alternatives and to offer them support in reaching that decision. 40 Days for Life seeks to witness to the society at large that abortion is a tragic choice, one that can be avoided.

MASS. GEN. LAWS ch. 266, § 120E1/2 ("the Act"), as interpreted and applied by the First Circuit Court of Appeals, will inhibit *Amicus* from carrying out its peaceful prayer vigils outside of abortion clinics in Massachusetts by creating a "no pro-life speech zone."

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court, all parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part. No entities other than the *Amicus* or its counsel have made a monetary contribution to the preparation or submission of this Brief.

Participants in 40 Days for Life campaigns are no longer allowed to pray in close proximity to abortion clinics, or to provide wanted and requested help to women entering abortion clinics – but abortion clinic employees are explicitly allowed to communicate with women entering the clinics.

SUMMARY OF ARGUMENT

In 2007, Massachusetts enacted a law to establish a "no pro-life speech zone" surrounding all locations performing abortions across the State except those within or upon the grounds of hospitals. This 35-foot radius zone extends around abortion clinic driveways, entrances, and exits encompassing public streets and sidewalks. MASS. GEN. LAWS ch. 266, § 120E1/2 (the "Act" or the "Massachusetts Act") prohibits anyone to "enter or remain on a public way or sidewalk adjacent" to a stand-alone abortion facility, but it does not equally apply to all persons. The Act exempts four classes of individuals, permitting them to enter or remain in this designated area: (1) persons entering or leaving the abortion clinic facility; (2) employees or agents of the abortion facility acting within their scope of employment; (3) law enforcement, ambulance, fire-fighting, and other municipal agents within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to the abortion clinic solely for the purpose of reaching a destination other than the clinic. *Id.* at § 120E1/2(b).

This "no-enter zone" for those opposing abortion allows police to arrest and punish any person engaging in pro-life advocacy, including: speaking, praying, wearing t-shirts/hats/buttons, displaying signs, leafleting, making consented approaches, and peaceful conversation. It prohibits all methods of communication of the pro-life message in a prototypical public forum, but protects abortion advocacy by permitting abortion clinic employees and agents to enter and remain in the zone.

The First Circuit affirmed a district court ruling that upheld the Act against a facial challenge as a content-neutral time, place, and manner regulation. *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). (*McCullen I*). Explaining its determination that the Act met the constitutional requirement for alternative channels of communication, the First Circuit stated that, in a facial challenge, "as long as we can envision circumstances in which a 35-foot buffer zone allows adequate alternative means of expression, the challenge must fail." *McCullen I*, 571 F.3d at 180. Addressing the question in the "as applied" challenge, which was severed and stayed by the court, the First Circuit, citing itself in *McCullen I*, states that "the Constitution neither recognizes nor gives special protection to any particular conversational distance." *McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013). "To be sure, the Act curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," the First Circuit found, but

continued: "But as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication." *Id.* at 13.

Amicus urges this Court to reverse the First Circuit and strike down the Act. The restrictions placed upon pro-life speech are neither content nor viewpoint neutral, but even assuming arguendo that they are, the Act does not survive an intermediate scrutiny analysis because it fails to offer pro-life speakers such as *Amicus* "ample alternative avenues" for communication, and it is not narrowly tailored. *Amicus* wishes to draw to the Court's attention the fact that it simply cannot engage in speech if these restrictions are upheld. It is no answer, as the First Circuit seemed to think, to point out that pro-life speech may be conducted outside the zone. The question is whether the kind of speech in which *Amicus* engages – peaceful, face-to-face communication – is possible from a distance of 35 feet. While others may wish to "speak" from such a distance, with large signs or bullhorns, that is no excuse to deprive *Amicus* and others who wish to engage in face-to-face communication from doing so. Speech is not reducible to shouting.

This Court has recognized that important elements of speech include the opportunity to reach an intended audience, communicating the identity of the speaker, and the use of the medium that the speaker judges to be most effective. In this brief, *Amicus* seeks

especially to review the Court's holdings that have recognized the importance of this manner of speech and its protection under the First Amendment. The importance of protecting person-to-person pro-life speech is only underlined by this Court's abortion jurisprudence, which has emphasized the importance both of persuasion among citizens and of the provision of relevant information to women.

For these reasons, the decision by the First Circuit should be reversed.

ARGUMENT

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Fourteenth Amendment makes that prohibition applicable to the State of Massachusetts. As the Court has explained "the freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The Court's abortion jurisprudence, foreclosing the ability of the people to ban abortion, highlights the need for robust abortion-related speech. "Absent

the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause." *Hill v. Colo.*, 530 U.S. 703, 787-88 (2000) (Kennedy, J., dissenting). This is particularly true in the context of speech outside of abortion facilities, for there is perhaps "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time. . . ." *Hill,* 530 U.S. at 792 (Kennedy J., dissenting). The guarantees of the First Amendment are crucial here, where speech "if it is to be effective, must take place at the very time and place a grievous moral wrong, in [the speaker's] view, is about to occur." *Id.* at 792.

The Massachusetts Act's no-entry zone surrounding abortion clinics infringes on these fundamental personal rights and liberties of *Amicus*. The Act's no-entry zone is, as we will explain, actually a no-pro-life-speech zone, where no alternatives to abortion may be offered. The Act's content-based and viewpoint-based discrimination require that the Act undergo strict scrutiny review. However, the Act does not survive even intermediate scrutiny because its no-speech zone significantly impairs the ability of *Amicus* to communicate its message and is not narrowly-tailored to serve a substantial government interest.

Additionally, while the State may not itself be obligated to provide information about abortion alternatives, given the importance of the abortion decision to the health of the woman, the State should not be allowed, under the guise of exercising its police

power, to deprive pregnant women of information about abortion alternatives provided by third-party, non-state actors on the public sidewalks outside of abortion clinics.

I. THE ACT'S ABORTION CLINIC NO-PRO-LIFE-SPEECH ZONE IS DISTINGUISHABLE FROM THE STATUTE UPHELD IN *HILL* AND CONSTITUTES BOTH CONTENT-BASED AND VIEWPOINT-BASED DISCRIMINATION REQUIRING A STRICT SCRUTINY ANALYSIS.

In *Hill v. Colorado*, this Court recognized, "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colo.*, 530 U.S. 703 at 716 (2000). *Hill* affirmed that it is "constitutionally repugnant" to prohibit a discussion of particular topics, while others are allowed. *Id.* at 722-23. Relying on *Hill* and its own opinions in *McGuire I* and *II*, the First Circuit declared the Massachusetts Act content-neutral and an appropriate time, place, and manner regulation. *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). (*McCullen I*); *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013).

The Massachusetts Act is content-based and viewpoint discriminatory. It violates all boundaries on regulating constitutionally protected speech. The precedent of the First Circuit decision – if allowed to

stand – permits blatant viewpoint discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, which will have widespread and deleterious effects on the First Amendment rights of persons in every State, including *Amicus*. *See, e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009) (looking to the *First Circuit* decisions in its application of *Hill* and standards of review); *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029 (N.D. Cal. 2009) (heavily relying on the First Circuit's decisions in *McGuire II* and *McCullen*), aff'd in part and rev'd in part, 653 F.3d 835 (9th Cir. 2011).

A. The application of the Act's no-speech zone to public areas surrounding *only* abortion clinics demonstrates that it is content-based.

Content-based regulations of speech are presumptively invalid. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007). "The rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Id.* at 188 (quoting *R. A. V. v. St. Paul*, 505 U.S. 377 at 387 (1992)).

The Act is clearly distinguishable from the one in *Hill* in ways that the Court found significant for determining that the Colorado "no approach" statute was content-neutral. First, the Colorado statute applied to all health care facilities. *Hill*, 530 U.S. at

708. Second, it encompassed a few subject matters of possible protest. *Id.* at 723. Third, the Colorado statute was a "no approach" law, still permitting engagement on the pro-life message with willing listeners. *Id.* at 708. And fourth, the 8-foot zone still allowed for a "normal conversational distance" between a potential listener and the messenger. *Id.* at 726-27 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)).

The Massachusetts Act is quite different. It prohibits all communication of pro-life messages within the designated 35-foot radial (70-foot in diameter) zone around *only* abortion clinics. The Act specifically excludes hospitals, defining "reproductive health facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Act § 120E1/2(a). The State has expressly preserved the right to peaceful, non-obstructive speech and expressive conduct *at all other healthcare facilities*. *See* MASS. GEN. LAWS ch. 266 § 120E (outlawing obstruction of access and impeding medical services but expressly preserving the "right[ ] to engage in peaceful picketing which does not obstruct entry or departure.")

In *Hill* the Court found it was "precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in [*Ward v. Rock Against Racism*], rather than a more strict standard." *Hill*, 530 U.S. at 731 (citing *Ward*, 491 U.S. 781, 791 (1989)). The Court in *Hill* explained that "[w]hat is important is

that all persons entering or leaving health care facilities share the interests served by the statute." *Hill,* 530 U.S. at 731. Creating a no-speech zone around abortion clinics, and *only* abortion clinics, is entirely different. It is not a "general policy choice" governing all health care facilities. It is aimed solely at abortion clinics. As such, it is not content-neutral.

B. The Act's exemption for patrons, employees and agents of the abortion clinic constitutes viewpoint discrimination.

The government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). Nor may the government "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Important to the Court's finding that the "no approach" statute in *Hill* was viewpoint neutral was that it applied to "all" speakers: "That is the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725.

The Massachusetts Act fails this constitutional requirement. Rather, it attempts to suppress the pro-life views of those opposed to abortion. Though the Act broadly prohibits entering or remaining within the zone surrounding abortion clinics, it ***exempts patrons, employees, and agents of the clinic***. Act

§ 120E1/2(b)(1) and (2). Thus, the Act grants preferential treatment for abortion advocates and those engaged in business with the industry. It prefers the speech of those in favor of abortion over the speech of those opposed thereto. As such, it is not viewpoint neutral.

One side of the abortion debate is represented in the zone while the other position is strictly prohibited. While the pro-life person may not wear into the "no pro-life speech zone" a vest, button, or any attire that identifies her position, the abortion clinic employee may do so. This Act permits abortion clinic employees and volunteers – dressed in brightly colored vests explicitly expressing their pro-choice position – to enter the zone, meet a clinic customer, and escort her into the clinic for an abortion appointment. This action speaks louder than any word in advocacy for abortion. Yet the Act makes it a crime for a pro-life advocate to approach a willing listener considering abortion and escort her outside the zone to discuss abortion alternatives. Within the zone, the pro-life advocate is not permitted to communicate while the advocates for abortion may speak loud and clear by leading women through the abortion clinic doors.

In addition, the Act allows clinic employees to make verbal statements that are forbidden of anyone wishing to communicate a pro-life message. For example, in fulfilling their "duty" to bring women into the clinic, clinic employees can grab a woman by the arm, guide her into the clinic, all the while saying,

"Don't worry. I can help you. Just follow me. . . ." – whether that communication is consented to by the woman or not.[2] The exact same phrase from a pro-life demonstrator is forbidden under the Act, even if a woman requests help from that pro-life demonstrator.

Through these various preferences, the Act essentially converts the public sidewalk into private property for the abortion facility.

II. THE ACT DOES NOT SURVIVE EVEN INTERMEDIATE SCRUTINY BECAUSE ITS NO-PRO-LIFE-SPEECH ZONE DOES NOT PROVIDE AMPLE ALTERNATIVE MEANS FOR *AMICUS* TO COMMUNICATE ITS MESSAGE AND IS NOT NARROWLY-TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST.

Although the Act is both content and viewpoint-based and should be subjected to strict scrutiny, it

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[2] In *McGuire II*, a case that upheld a "no approach" statute enacted by Massachusetts in 2000, the First Circuit acknowledged that "escorts sometimes tell patients things to the effect that they do not need to listen to the pro-life protestors. . . . [E]scorts sometimes 'ask[ ]' or 'suggest[ ]' that patients give them any anti-abortion leaflets they have received from protestors. For example, they say things like: 'Do you want me to take that from you,' or 'You know, you don't need that.'" *McGuire v. Reilly*, 386 F.3d 45, 54 (1st Cir. 2004). The 2007 Massachusetts Act that is before the Court in the present case expressly allows this continued communication by abortion clinic employees, but prohibits the exact same conduct by pro-life demonstrators.

fails to satisfy even the lesser demands of intermediate scrutiny applied to content and viewpoint neutral restrictions. Content-neutral restrictions (*i.e.*, restrictions on time, place or manner of speech or expressive conduct) are only permissible if they are narrowly tailored to serve a substantial government interest and leave open ample alternative channels for communicating this information. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

The First Amendment "protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Hill,* 530 U.S. at 728. (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

A. The Act's no-pro-life-speech zone does not provide ample alternative means for pro-life communication as required by intermediate scrutiny.

Content-neutral time, place, or manner restrictions on expression (whether oral, written, or symbolized by conduct) must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468

U.S. 288 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). The Court has held that First Amendment concerns are not satisfied simply because another type or location of speech is available. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). By limiting the availability of a particular means of communication, even content-neutral restrictions can significantly impair the ability of individuals to communicate their message. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

In the present case, adopting the First Circuit's analysis (that it is sufficient that petitioners are "visible" while standing outside the 35-foot zone) would render the constitutional requirement for "ample alternative channels" practically meaningless. The First Circuit's finding that "communicative activities flourish" outside the Act's speech-free zone (*McCullen*, 708 F.3d at 13) is constitutionally-irrelevant. The question is whether the pro-life speech of speakers such as *Amicus* is infringed, not whether others are content to use bullhorns or shouting outside the zone.

1. Peaceful speech and prayer outside abortion facilities is central to the mission of *Amicus*.

40 Days for Life is a community-based, pro-life campaign "with a vision to access God's power through prayer, fasting, and peaceful vigil to end abortion." *About 40 Days for Life*, 40 DAYS FOR LIFE, http://www.40daysforlife.com (last visited Sept. 9, 2013). *Amicus* states on its website that the mission of its campaign is "to bring together the body of Christ in a spirit of unity during a focused 40 day campaign of prayer, fasting, and peaceful activism. . . ." *Id.*

To officially participate in 40 Days for Life, *Amicus* requires the completion of an application process. A campaign coordinator must pledge to conduct his or herself and the 40 Days for Life campaign "in a positive manner with respect, professionalism and a compassionate, Christ-like attitude." *See Application for September 25-November 3, 2013 campaign*, 40 DAYS FOR LIFE, *available at* https://www.surveymonkey.com/s/40dfl-application (last visited Sept. 10, 2013). Coordinators also pledge that their campaigns will be conducted "in a peaceful, law-abiding manner and to obey the instructions of law enforcement officials." *Id.* In addition, they explicitly pledge "to avoid speaking or acting in a way that is intended to harm, intimidate, frighten, antagonize or insult others." *Id.* Six cities in Massachusetts are approved to participate in the 40 Days for Life 2013 campaign, which will take place from September 25

to November 3: Attleboro, Boston, Haverill, Lynn, Springfield, and Worcester.

The visible, public centerpiece of 40 Days for Life is a peaceful vigil. *Amicus* explains on its website that this vigil is "a focused, 40-day, non-stop, round-the-clock prayer vigil outside a single Planned Parenthood center or other abortion facility in your community." 40 DAYS FOR LIFE, *supra*. Campaign coordinators must pledge to "commit to strive for peaceful vigil coverage of a minimum of 12 hours per day, each day [of the 40 day campaign]." *Application, supra*. (Due to safety concerns at some locations, particularly inner-city locations, some campaigns are allowed to hold their vigils for only 12 hours per day, if needed.)

The message intended by *Amicus* for its vigil is "a peaceful and educational presence." *Id. Amicus* intends that "[t]hose who are called to stand witness during this 24-hour-a-day presence send a powerful message to the community about the tragic reality of abortion." *Id.* The peaceful vigil conducted by *Amicus* outside abortion facilities "also serves as a call to repentance for those who work at the abortion center and those who patronize the facility." *Id.*

The nature of the speech *Amicus* intends to communicate, and *Amicus'* commitment to ensuring its campaigns communicate its intended message, is demonstrated both by the application campaign coordinators are required to submit and by the "Statement of Peace" each individual participating in a 40 Days

for Life campaign must sign. *See Statement of Peace*, 40 DAYS FOR LIFE, *available at* http://www.40daysforlife.com/docs/fall2013/statement_of_peace.doc (last visited Sept. 10, 2013). Each volunteer testifies that she will "show compassion and reflect Christ's love to all (abortion facility or Planned Parenthood) employees, volunteers, and customers." *Id.* Volunteers likewise promise to "not obstruct the driveways or sidewalks," "not threaten, physically contact, or verbally abuse (abortion facility or Planned Parenthood) employees, volunteers or customers," "not damage private property," and "cooperate with local authorities." *Id.*

The guarantees of the First Amendment are crucial for *Amicus* because speech meant to persuade against abortion "if it is to be effective, must take place at the very time and place a grievous moral wrong, in [the speaker's] view, is about to occur." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting). There is perhaps "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time. . . ." *Id.* at 792.

Amicus recognizes that not everyone welcomes its message. However, as the Court noted in *Hill*, "leafleting, sign displays, and oral communications are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection." *Hill*, 530 U.S. at 715.

2. The Act's no-pro-life-speech zone makes it impossible for *Amicus* to engage in such speech.

The Act's no-speech zone changes the voice, the tone, and thus the identity and message of a speaker wishing to offer alternatives to abortion. The Act dictates the use of a raised voice or a large sign for anyone opposing abortion. The Act forces anyone speaking in favor of alternatives to abortion to scream or be silent, to be loud or be absent. For *Amicus*, the Act's restrictions "will necessarily impede, rather than assist, the speaker's efforts to communicate their message." *Hill*, 530 U.S. 727.

a. The First Amendment protects *Amicus*' right to select what it believes to be the most effective means for communication.

The First Amendment does not merely protect the right to advocate a cause; it protects the right "to select what [the speaker believes] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

In *Meyer* the Court noted that the mere existence of alternative means of communication was not sufficient. "That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424. The law at issue in *Meyer* prohibited what the Court described as

"access to the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* at 424. "[T]hat it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Id.* at 424 (quoting *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). *Cf. Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296, 299 (1981)).

In the present case, *Amicus* is not permitted to select what it believes to be the most effective means to advocate its cause. *Amicus* is no longer allowed to pray in close proximity outside abortion clinics or to provide requested help to women entering those clinics.

b. The Act fails to allow *Amicus* to engage in speech with its intended audience from a "normal conversational distance."

The value of direct, face-to-face, personal communication in attempts to persuade a speaker's intended audience is a thread that runs deeply throughout this Court's First Amendment cases. The unconstitutional law at issue in *Meyer v. Grant* prohibited "direct one-on-one communication," which the Court described as "access to the most effective, fundamental . . . avenue of political discourse" *Meyer*, 486 U.S. at 424.

Notably, in another abortion-related speech case, this Court struck down a 15-foot floating buffer zone

because it would have prohibited anti-abortion protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are on public sidewalks." *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). The Court in *Hill* agreed as to the importance of ensuring speech can occur from a "normal conversational distance." *Hill*, 530 U.S. 726-27.[4]

The Court has recognized the importance of personal, face-to-face, direct communication even in the context of lesser-protected commercial speech. In *Edenfield v. Fane*, the Court found a violation of the free speech guarantees of the First and Fourteenth Amendments by a State rule that prohibited a certified public accountant (CPA) from "direct, in-person, uninvited solicitation." 507 U.S. 761 (1993). The fact

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[4] Whether the 8-foot zone upheld in *Hill*, in fact, affords a "normal conversational distance" is something the Court may want to reconsider. The majority in *Hill* concedes, at least, that "the distance certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention." *Hill*, 530 U.S. at 726. Considering the context of this speech – a public sidewalk, and a conversation between unfamiliar persons, "background noise" is not the only factor that may make the required separation an abnormal distance for conversation. ("I have certainly held conversations at a distance of eight feet seated in the quiet of my chambers, but I have never walked along the public sidewalk – and have not seen others do so – 'conversing' at an 8-foot remove." *Hill*, 530 U.S. at 756 (Scalia, J., dissenting).)

that the State rule prohibited face-to-face speech was of crucial importance. "Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller." *Id.* at 766.

The Massachusetts Act's 35-foot no-speech zone clearly prohibits *Amicus* from engaging with its intended audience, which includes those who work at the abortion center and those who patronize the facility, from a "normal conversational distance."

Notably, the First Circuit opines that those wishing to reach an audience within the no-speech zone "have the option (which they sometimes have exercised) of using sound amplification equipment." *McCullen*, 708 F.3d at 13. That is precisely what is wrong with the Act. It prohibits the normal conversation essential to *Amicus*' speech. The shouting-match envisioned by the First Circuit eviscerates *Amicus*' ability to be heard by the women whom it seeks to engage in a normal conversation. Speech is not reducible to shouting.

c. *Amicus*' identity is interwoven with the location of its speech and is an important component of its attempts to persuade.

As noted, *Amicus* is not a shouter. Rather it engages in peaceful, personal interaction with women approaching abortion clinics. It cannot "speak" if it is forced to go elsewhere (*i.e.*, outside the 35-foot zone).

The importance of the location where speech occurs and of its intersection with the speaker's identity has been recognized by this Court. For example, in *City of Ladue v. Gilleo*, the Court found that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." 512 U.S. 43 at 56. The Court explained that "[p]recisely because of their location, such signs provide information about the identity of the 'speaker.'" *Id.* at 56.

The Court noted: "A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *Id.* at 56-57.

In the present case, barring *Amicus* from speaking within a 35-foot radius of an abortion facility alters the identity of *Amicus* and its intended message of peacefully offering, in a personal interaction, alternatives to abortion. The Act forces *Amicus* off public sidewalks, which is what the Court has recognized as "the prototypical example of a traditional public forum," where speech is "at its most protected." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377

(1997) (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988); *United States v. Grace*, 461 U.S. 171, 180 (1983)).

B. The Act's prohibition of peaceful speech by *Amicus* with willing listeners is not narrowly tailored to further a substantial government interest.

Even assuming, arguendo, a substantial government interest in public safety, the Act's abortion-specific no-speech zone is not narrowly tailored to that interest. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. The Massachusetts Act is vastly over-inclusive; criminalizing the peaceful speech and prayer of *Amicus* on a public sidewalk, regardless of whether there are willing listeners or no listeners at all, does not advance the government's stated interest in public safety.

In *Madsen v. Women's Health Ctr.*, striking down part of an injunction against abortion protestors, the Court found "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech

than necessary to prevent intimidation and to ensure access to the clinic." 512 U.S. 753, 774 (1994). The Court concluded that "absent evidence that the protesters' speech is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the provision prohibiting petitioners, within 300 feet of the clinic, from approaching any person seeking services of the clinic unless the person indicates a desire to communicate] cannot stand." *Id.* at 774.

The Court in *Hill* emphasized that central to its analysis was that the "no approach" Colorado statute still permitted *consensual* speech – "The regulations in this case, however, only apply if a pedestrian does not consent to the approach." *Hill*, 530 U.S. at 734. The Court in *Hill* stressed that it was "important" to recognize the "significant difference" between the statute before it and restrictions on "a speaker's right to address a willing audience." *Id.* at 715-16.

The Massachusetts Act is significantly different from the law upheld in *Hill*. It is over-inclusive by restricting all speech, including that with a willing audience. That *Amicus* has experienced success in its speech and prayer outside of abortion facilities demonstrates that there is a willing audience that is impacted and persuaded. Since 2007, there have been 12 nationally-coordinated 40 Days for Life campaigns. Over 2,480 individual local campaigns have taken place in 501 cities. 40 DAYS FOR LIFE, *supra*. More than 575,000 people have joined together in a display

of unity to pray and fast for an end to abortion. *Id.* Reports document that 7,536 lives have been spared. Those are "just the ones [*Amicus*] know[s] about." *Id.* 83 abortion workers have quit their jobs and walked away from the abortion industry. *Id.* Many people with past abortion experiences have "stepped forward to begin post-abortion healing and recovery." *Id.*

"They made a difference in my life," writes Abby Johnson, former Director of a Planned Parenthood in Bryan, Texas. David Bereit & Shawn Carney, 40 DAYS FOR LIFE 9 (Capella Books 2013). Noting that she "watched from inside the Planned Parenthood abortion center I managed while the first-ever 40 Days for Life Campaign took place," Ms. Johnson describes the impact that 40 Days for Life campaigns had over the years: "Was it working? Yes. Clients were walking away from our Planned Parenthood facility and accepting information about alternatives from the volunteers." *Id.* at 9.

As noted above, the impact of 40 Days for Life's presence outside the abortion clinic extends beyond women entering the clinics to clinic employees. As Ms. Johnson notes, "I couldn't stop thinking about the 40 Days volunteers in front of our facility who, every day, told me they were praying for me. That, too, was working, although I didn't realize it yet." *Id.* at 9. Ms. Johnson explains, "Five years after the first 40 Days for Life Campaign started, I found myself convicted to leave my job. It had taken eight years of prayer and outreach to me, a Planned Parenthood regional Employee of the Year." *Id.* at 9.

The speech-free zone of the Massachusetts Act does not "simply empower private citizens" to avoid an unwanted approach. Instead, the Act essentially converts a public sidewalk, a quintessential public forum, into private property for the abortion facility, and it imposes criminal penalties on anyone who would peacefully offer arguments against, or alternatives to, abortion.

III. By prohibiting speech about abortion alternatives, the Act denies women the opportunity to receive information on which to base their decisions.

This Court has noted that each State has an interest from the on-set of pregnancy in protecting the health of the woman. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Paradoxically, in this case, the State of Massachusetts seeks to deny this interest.

As this Court noted in *Gonzales v. Carhart*, "whether to have an abortion requires a difficult and painful moral decision . . . [I]t seems unexceptionable to conclude some women come to regret their choice to abort. . . . Severe depression and loss of esteem can follow." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007) (internal citations omitted).

Given that the decision whether to abort is necessarily "a decision so fraught with emotional consequence" (*Gonzales*, 505 U.S. at 159), a pregnant woman needs the opportunity to consider all relevant

information in order to make that decision, including information about alternatives to abortion. Surely it is not within the State's power to deny a pregnant woman this very opportunity to receive information, information which she may accept or reject but which is offered, peacefully and gently, by *Amicus* on the sidewalks outside abortion clinics. *Amicus* is there to offer the woman information about abortion alternatives. Some women may not wish to receive such information, but as explained in part II above, many do. (And none are forced to receive it.) Yet, Massachusetts denies its interest in the health of the pregnant woman by denying her the *opportunity* to consider the information about abortion alternatives by banning *Amicus* from the area outside abortion clinics. This is the last place – and the last opportunity – for a pregnant woman to receive information relevant to this "decision so fraught with emotional consequence." To deny her this opportunity is further evidence of the Act's bias against speech opposing abortion and offering alternatives, underscoring its infirmity under the First Amendment.

CONCLUSION

The Act's relegation of speakers such as *Amicus* to an area beyond 35 feet from abortion clinics effectively deprives *Amicus* and others like it of the opportunity to speak at all. *Amicus* seeks to engage women approaching abortion clinics in personal, face-to-face, peaceful dialogue. In this encounter, the identity of

the speaker as one who speaks quietly and lovingly is important. Amplified sound and large signs are not adequate substitutes. Speech is not reducible to shouting, and this Court's jurisprudence protects communication within a normal conversational distance. As noted, there is a willing audience for *Amicus*' speech. Over many years, many pregnant women have joined in the conversational opportunity offered by *Amicus* on the sidewalks outside abortion clinics.

In foreclosing the possibility of such speech, the Act demonstrates that it is neither content-neutral nor viewpoint-neutral. Further it does not survive even the demands of intermediate scrutiny because it fails to provide ample alternative means of communication and is not narrowly tailored to serve a substantial governmental interest.

For the foregoing reasons, the decision of the First Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

MARTHA COAKLEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The Institute is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute has challenged laws that prevent individuals and small businesses from displaying safe and effective signs based on who those speakers are and what their signs say, including in *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) and *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012). The Institute also litigates other free-speech cases where a fundamental issue is if the challenged law is content-based or content-neutral. The Institute's experience will provide the Court with valuable insight as to how the differing tests for content neutrality, as laid out in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), have sown confusion in lower courts and harmed First Amendment rights.[1]

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[1] All parties have consented to the filing of this brief. The Institute affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996). Conflicting language in this Court's free-speech cases, however, has profoundly confused the lower courts, some of which now hold that laws regulating the content of one's message are in fact content-neutral. Because these holdings threaten to erode the First Amendment's protections, this Court should harmonize the two leading tests for whether a law is content-based and make clear that failing either test triggers strict scrutiny. And this is the ideal case to resolve this issue: Although *amicus* does not engage in the merits of this case or take a position on whether the law at issue is content-neutral, it recognizes that the First Circuit, in resolving that question, asked only if the government adopted the law "because of disagreement with the message" of petitioners and others. *McCullen v. Coakley*, 571 F.3d 167, 176 (1st Cir. 2009) (quoting *Ward*, 491 U.S. at 791).

Traditionally, a law was content-based if its application required officials to inspect one's message to determine how it could be regulated. *See, e.g.*, *Mosley*, 408 U.S. 92; *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("After all, whether a statute is content neutral or content based

is something that can be determined on the face of it. . . ."). But beginning with *Ward*, the Court laid out a supplemental test that turns on the law's purpose. Under that standard, laws are content-neutral if they are "*justified* without reference to the content of the regulated speech." 491 U.S. at 791 (emphasis added).

Although the test in *Ward* was *one* way for courts to decide if a law was content-based, some lower courts began to treat it as the *only* way. This tendency increased after *Hill v. Colorado,* where this Court held that examining speech to determine if it was "protest, education, or counseling" did not make the statute content-based. 530 U.S. 703, 720 (2000). Due to *Ward* and *Hill*, some lower courts now hold that laws are content-based only if they regulate speech for explicitly censorial reasons. For those courts, a law with a neutral justification receives only intermediate scrutiny, even if it facially treats some messages more harshly than others. The Fifth Circuit, for instance, stated that a law "is content based if . . . it differentiates based on the content of the speech on its face," *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509-10 (5th Cir. 2009) (citation omitted), but then cited *Ward* to hold that a dress code permitting only school logos on clothing was content-neutral because its purpose was "to provide[ ] students with more clothing options than they would have had under a complete ban on messages." *Palmer*, 579 F.3d at 510.

This exclusive focus on government purpose conflicts with the reasoning of traditional First

Amendment cases like *Mosley* and *Arkansas Writers' Project*. And it has confused the federal and state judiciaries, most noticeably in the area of sign law. Some sign codes exempt certain messages, such as government flags, civic crests, and works of art, from regulation. *See, e.g.*, St. Louis, Mo. Zoning Code § 26.68.020. By last count, four circuits have held that when a sign law permits some signs but not others based on what they say, it is discriminating based on content. *See, e.g.*, *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (holding that "the zoning code's definition of 'sign' is impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction") (citation omitted). But at least two other circuits have concluded that such laws are content-neutral despite such discrimination because their purpose is not to suppress any particular message. *See, e.g.*, *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (stating that "a regulation [must] do more than merely differentiate based on content to qualify as content based" in holding that a sign code that exempts works of art from regulation was content-neutral).

The Court should harmonize these two tests. Just as the Court explained in *United States v. Jones*, 132 S. Ct. 945 (2012), that a Fourth Amendment search occurs either when the government impinges on a person's reasonable expectation of privacy *or* when officials intrude upon private property to acquire information, so it should explain that a law is

content-based either if its purpose is to suppress the communicative impact of one's speech *or* if it requires officials to inspect a message's subject in deciding how it should be regulated. By making clear that there are two tests to determine if a law is content-based, and that lower courts should apply them both, this Court can ensure that the government cannot insulate itself from heightened scrutiny while picking and choosing what messages may be shared.[2] *See Wag More Dogs*, 680 F.3d at 363 (holding law content-neutral even though it authorized a government official to tell speaker that her mural could be shown only if it did not depict "something to do with dogs, bones, paw prints, pets, people walking their dogs, etc.").

ARGUMENT

This Court's precedents have sown deep doctrinal confusion on the most fundamental issue in First Amendment jurisprudence. On the one hand, this Court has repeatedly declared that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983), and has struck down laws that restricted speech by certain speakers and subjects even when passed for

[2] Although *amicus* asks this Court to clarify what makes a law content-based, it does not opine on whether the specific law at issue in this case is content-based under either test or whether it survives the requisite level of scrutiny.

the best of reasons. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (invalidating New York's "Son of Sam" law under strict scrutiny despite government's interest in ensuring that criminals do not profit from their crimes).

At the same time, though, this Court has stated that the "government's purpose [in enacting a speech regulation] is the controlling consideration," *Ward*, 491 U.S. at 791. As a result, this Court has sometimes held that a law is content-neutral if it is passed for non-speech reasons, even if it explicitly treats certain subjects more harshly than others. Coupled with this Court's ruling in *Hill v. Colorado* that a law making it illegal to approach someone to engage in "protest, education, or counseling" was content-neutral, 530 U.S. at 720, *Ward*'s focus on legislative motive has spread throughout the Court's First Amendment jurisprudence. Indeed, it is the test the First Circuit employed in holding Massachusetts' law to be content-neutral. But the exclusive use of this purpose-based test threatens to short-circuit the heavy scrutiny courts should employ in construing laws that on their face treat some messages more harshly than others. *See Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013) (stating that "we have not hesitated to deem [that] regulation content neutral even if it facially differentiates between types of speech" in upholding sign code that restricted display of political protest sign but exempted "public art" from regulation) (alteration in original).

Last year in *United States v. Jones*, 132 S. Ct. 945 (2012), this Court reminded lower courts that it had two separate tests for whether a Fourth Amendment search had occurred. This case provides the Court with an opportunity to do the same for the First Amendment. In Section I, *amicus* walks through this Court's First Amendment jurisprudence and how it traditionally held that a speech restriction was content-based if its application turned on what one wished to say. In Section II, *amicus* explores this Court's "secondary effects" doctrine, which allows laws imposing greater burdens on adult businesses than other speakers to be deemed content-neutral if passed for non-censorial purposes, and how that doctrine's logic soon found its way into cases that had nothing to do with adult entertainment like *Ward v. Rock Against Racism*. Section III explains how some lower courts now view governmental purpose as the exclusive test for content neutrality, with the effect that they evaluate laws that regulate some messages more heavily than others under the less rigorous strictures of intermediate scrutiny. Finally, in Section IV, *amicus* asks that the Court remind lower courts that a law should be treated as content-based and therefore subject to strict scrutiny either (1) when, on its face, the law treats speakers differently because of their subject matter; or (2) when the purpose behind a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. Only this two-part inquiry will protect against the erosion of First Amendment rights that the exclusive

invocation of *Ward*'s purpose-based inquiry has engendered.

I. The Development of the Court's Traditional First Amendment Doctrine.

The Supreme Court has been protecting private speech through the First Amendment for the better part of a century. Yet for many years, the Court did not analyze cases through any consistent, rigorous analytical structure. Instead, the Court decided cases on a largely ad hoc basis, with the Court's members making their own independent determinations of whether a speech restriction ran afoul of the Constitution. But as the Court's First Amendment jurisprudence crystallized, it became evident that in most instances a law would be deemed content-based if its terms treated some topics and speakers more favorably than others. At the same time, the Court also recognized that even a facially neutral law could be subject to strict scrutiny if its manifest purpose was to regulate speech for censorial reasons.

A. Early First Amendment Cases: Results But No Doctrine.

Unlike today, in the middle of last century the Supreme Court lacked a systematic approach to categorizing and analyzing alleged free-speech violations, instead deciding cases on grounds that only later would shape the contours of First Amendment doctrine. In *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949),

for instance, the Court upheld a Trenton, New Jersey law that made it illegal "to play, use or operate for advertising purposes . . . a sound truck, loud speaker or sound amplifier . . . which emits therefrom loud and raucous noises." The majority in *Kovacs* did not ask if Trenton's law was content-based or content-neutral; such terminology had not yet been developed. The Court instead ruled that, unlike a complete ban on all sound-making devices, Trenton could "bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities." *Id.* at 87. In so doing, the Court distinguished *Saia v. New York*, 334 U.S. 558 (1948), on the grounds that New York's exemption for "items of news and matters of public concern" granted the Chief of Police unfettered discretion to decide who may speak and who may not.[3]

Other instances of the Court's inchoate approach to the First Amendment arose in cases where members of the Jehovah's Witnesses were prosecuted for proselytizing in public spaces. In *Niemotko v.*

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[3] Some members of the Court in *Kovacs* struggled with the fact that the law at issue banned more speech than the law struck down in *Saia*. Justice Jackson, for instance, argued that *Saia* was in fact a more modest restriction of speech, because it allowed the use of sound trucks "when and where the Chief of Police saw no objection." *Kovacs*, 336 U.S. at 97-98 (Jackson, J., concurring). This analysis echoes Justice Burger's dissent in *Metromedia, Inc. v. City of San Diego*, wherein he chastised the plurality for striking down San Diego's sign ordinance because it exempted certain "defined classes of signs" from regulation. 453 U.S. 490, 563-64 (1981) (Burger, J., dissenting).

Maryland, 340 U.S. 268 (1951), a state court convicted members of the Jehovah's Witnesses for disorderly conduct after they spoke out in public parks without first obtaining a permit. The Supreme Court invalidated the convictions, holding first that the members' speech was deemed disorderly only because it was conducted without a permit. It then went on to strike down the permitting requirement, holding that because it did not have sufficient procedural protections in place, it amounted to a prior restraint. *Id.* at 272. Nowhere in *Niemtoko*'s discussion of the law did the Court ever discuss whether the state's disorderly conduct statute was content-based either on its face or as applied to the defendants. Likewise, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), a minister was arrested when he began to speak to his fellow Jehovah's Witnesses in a public park. Charged with violating a law that made it a crime to "address any political or religious meeting in any public park," the minister appealed to the U.S. Supreme Court. In reversing the convictions, the Court held that the government could not pick and choose which religions it let speak out in the park. *Id.* at 69. But just as in *Niemtoko*, the Court in *Fowler* analyzed the case without the benefit of a formal analytical structure.

The problem with this ad hoc approach was apparent: Without a firm theoretical underpinning, the Court's decisions in various cases could not be easily synthesized into a cohesive rule of law. This left lower courts with little guidance about how they should apply the Court's decisions to new fact

patterns. But developments in the Court's First Amendment jurisprudence soon addressed these concerns.

B. The Court, Leaning on Its Equal-Protection Jurisprudence, Develops a Comprehensive System for Scrutinizing Speech Restrictions.

The problems with the Court's ad hoc approach to speech issues led to a push to increasingly formalize First Amendment doctrine. As that doctrine developed, it focused on whether the terms of a law required officials to inspect speech to determine what it said. If the face of the law treated some messages more harshly than others, it would face a more probing review than laws that did not differentiate based on subject matter.

The first major case to expressly focus on subject-matter restrictions was *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, Chicago passed a disorderly conduct ordinance that barred picketing within 150 feet of schools during the school day. The ordinance, however, expressly exempted labor disputes from the restriction. Mosley, a long-time protestor outside of Chicago public schools, brought suit, and while the district court dismissed the complaint, the Seventh Circuit reversed and held the ordinance to be invalid. *Id.* at 94.

On review, the Supreme Court upheld the Seventh Circuit, although it held that the ordinance was

unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Court looked to the terms of the ordinance itself and reasoned that because the ordinance "describes permissible picketing in terms of its subject matter," it regulated speech because of what it said. *Id.* at 95. Because the streets were a traditional place for the public to gather and speak, the "government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96. Accordingly, said the Court, the ordinance's content-based distinction could survive only if it was "tailored to serve a substantial government interest." *Id.* at 99.[4]

The City of Chicago defended the distinction on the idea that the law had a neutral purpose, *i.e.*, to preserve public order, and the fact that it exempted labor picketing was justified because it was less likely

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[4] This protean formulation of strict scrutiny borrows from equal-protection jurisprudence, which imposes different degrees of scrutiny based on whether the law accomplishes its objective by treating different racial or ethnic groups in a differential manner. Some members of this Court have rejected this approach, instead arguing that laws that facially discriminate between speech and speakers on the basis of what they have to say should be subject to a rule of per se invalidation. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (contending that "political speech simply cannot be banned or restricted as a categorical matter") (citing *Simon & Schuster, Inc.*, 502 U.S. at 124 (Kennedy, J., concurring in judgment)).

to be disruptive than other forms of picketing. But the Court rejected this supposition, noting that to accept such free-floating claims, based on broad generalities and divorced from any actual facts, "[f]reedom of expression . . . would rest on a soft foundation indeed." *Id.* at 101. Finding no reason sufficiently important to justify Chicago's content-based distinction, the Court declared the city's picketing ordinance unconstitutional.

Mosley was the Court's first major attempt to formalize its approach to First Amendment cases. Three years later in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court further explained how it would analyze free-speech claims. The issue in *Erznoznik* was a Jacksonville ordinance that prevented the display of nudity on drive-in theater screens. The Court distilled the lessons from several previous cases and sketched out how it would generally approach First Amendment cases going forward:

> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than

> others, the First Amendment strictly limits its power.

Id. at 209 (internal citations omitted).

The Court held that Jacksonville's law was a content-based restriction on speech because it prevented "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* at 211-12. Jacksonville argued that the law was an attempt to protect both children and the privacy of accidental viewers. The Supreme Court rejected these justifications and struck down the ordinance, noting that the restriction reached farther than necessary to protect children and that if adults wished to avoid depictions of nudity, they need only avert their eyes. *Id.* at 212.

The Court followed its approach in *Erznoznik* in later cases by first analyzing whether a law applied to all speakers or if it facially discriminated between speakers based on what they are saying. The answer to that question then governed what level of judicial scrutiny applied. *See, e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) (applying "exacting scrutiny" to law prohibiting corporations from spending money in ballot-issue elections and stating that the legislature "is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue") (citing *Mosley*, 408 U.S. at 96); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (invalidating Illinois law that forbade picketing of residences with exception for

labor protests after finding it to be content-based and therefore should be "carefully scrutinized").[5]

This Court has applied heightened scrutiny (whether termed as "exacting," "careful," or "strict") to laws that turn on the content of the speech even where there was no hint of censorial motive. This was the case with the laws in *Mosley* and *Carey*, which were both passed to protect the public and maintain order, not to suppress speech. Likewise, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981), a plurality of this Court held that San Diego's sign ordinance, which permitted certain types of noncommercial signs in commercial and industrial zones, was content-based and therefore subject to heightened scrutiny. Citing to *Carey*, the plurality stated that cities do "not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id.* Because the city permitted some noncommercial messages to be conveyed on billboards in specified areas of the city, it had to

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[5] It is very likely that laws like those in *Mosley* and *Carey* would be deemed content-neutral under the purpose-based test *amicus* discusses in Section II. Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115 (1987). This is because the governmental purpose behind those anti-picketing laws was not to suppress any particular message but to maintain public peace and order. *Mosley*, 408 U.S. at 101 (stating that government's interest was "in preventing disruption" in front of Chicago schools); *Carey*, 447 U.S. at 464 (stating that banning picketing in front of residences was motivated by an "interest in residential privacy").

similarly allow billboards conveying other noncommercial messages in those same areas. *Id.* at 515. This was the case even though Justice Stevens, writing in dissent, correctly pointed out that "there is not even a hint of bias or censorship in the city's actions." *Id.* at 552 (Stevens, J., dissenting in part).

Two taxing cases, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), further explained that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. In both *Minneapolis Star* and *Arkansas Writers' Project*, this Court struck down use and sales taxes that applied only to a few publications, in the case of *Minneapolis Star*, or to publications that the state did not deem to be religious, professional, trade, or sports periodicals, as in *Arkansas Writers' Project*. Neither the Court nor the parties alleged that the purpose behind the tax regimes was to silence certain disfavored speakers, nor was there any need to adduce evidence of "an improper censorial motive." *Arkansas Writers' Project*, 481 U.S. at 228. All that mattered was that the laws by their terms burdened only certain speakers and, in the case of *Arkansas Writers' Project*, required government officials to "examine the content of the message that is conveyed" to decide whether it could be taxed. *Id.* at 230. That was enough for the Court to declare that the law in each case was subject to strict scrutiny.

II. The Court, Beginning with the "Secondary Effects" Doctrine, Articulates a Second Test Based on the Government's Justification for Regulation.

At the same time that this Court formalized its traditional test for whether a law is content-based, it began to review First Amendment challenges to local zoning rules concerning adult businesses, including adult movie theaters and strip clubs. Under the traditional test laid out in *Mosley*, *Erznoznik*, and *Arkansas Writers' Project*, these rules were clearly content-based in that they only applied to businesses that spoke on a particular subject.

But rather than say that these laws were subject to strict scrutiny – or alternatively creating an exception in the Court's First Amendment jurisprudence for adult businesses – the Court instead held that they were content-neutral under its newly developed "secondary effects" doctrine. In Subsection A, *amicus* explains the development of the doctrine and how it allowed laws that expressly discriminate against certain messages to be deemed content-neutral if the proffered reason for regulation was not to suppress speech but to deal with the unwanted side effects of that speech. Despite concerns that applying the secondary-effects doctrine outside of the adult entertainment context could eviscerate First Amendment freedoms, Subsection B describes how this Court spread the doctrine's logic throughout the entirety of First Amendment jurisprudence through cases like *Ward v. Rock Against Racism* and *Hill v. Colorado*.

The end result is that lower courts now frequently hold that laws that turn on the content of one's speech are content-neutral and subject only to intermediate scrutiny.

A. The Development of the Court's Secondary-Effects Doctrine.

The Court first laid the groundwork for the secondary-effects doctrine in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which dealt with a Detroit ordinance that prohibited adult theaters from being located within 1000 feet of any two other "regulated uses." *Id.* at 52. The face of the ordinance turned on what types of films the theater showed: If it presented material that emphasized certain "Specified Sexual Activities," it was subject to the ordinance's locational restrictions. *Id.* at 53. Two adult movie theater operators sued, arguing that the ordinance was content-based and failed heightened scrutiny.

Although the ordinance expressly subjected adult businesses to burdens not shared by other speakers, four justices, in an opinion written by Justice Stevens, held that it was not subject to heightened scrutiny. Rejecting *Mosley*'s statement that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone," the plurality said that "[t]his statement . . . read literally . . . would absolutely preclude any regulation of expressive activity

predicated in whole or in part on the content of the communication." *Id.* at 65. Because the four justices felt that the purpose of the ordinance was to alleviate the secondary effects that Detroit said surrounded adult theaters, rather than to suppress the theaters' speech, they held it to be constitutional. *Id.* at 71 & n.34.

The plurality's decision in *Young* was controversial. Four justices criticized the plurality's view that sexually explicit – but non-obscene – speech was entitled to less First Amendment protection. *See Young*, 427 U.S. at 86 (Stewart, J., dissenting). They also attacked the idea that the government could make content-based distinctions without facing heightened scrutiny. Ultimately, the dissent viewed the decision as "an aberration" that would hopefully not be repeated. *See id.* at 87.

For a decade, *Young* did appear to be an aberration. But that changed with the Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Renton's ordinance, like the ordinance in *Young*, applied only to adult entertainment businesses, and whether a business was subject to the rule turned on what those businesses displayed. In an opinion authored by Justice Rehnquist (who had joined the *Young* plurality), the Court fully embraced the secondary-effects doctrine, claiming that "the resolution of this case is largely dictated by our decision in *Young*." *Id.* at 46. The majority believed that Renton's chief concern "was with the secondary

effects of adult theaters, and not with the content of adult films themselves." *Id.* at 47. Accordingly, the majority concluded that Renton's ordinance was content-neutral, even though it turned on what the theaters depicted, because it was "*justified* without reference to the content of the regulated speech." *Id.* at 48 (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

The Court's decision in *Renton* was deeply divisive. Calling the majority's approach "misguided," Justice Brennan argued that although the threat of negative secondary effects might be a reason to regulate adult movie theaters, the stated purpose for a regulation cannot turn a content-based law into a content-neutral one. *Id.* at 56-57 (Brennan, J. dissenting). Brennan consoled himself with the fact that the doctrine had only been applied in the adult zoning context, but commentators were not so sanguine. They noted that if the secondary-effects doctrine spread, it potentially could redraw the Court's entire content-based/content-neutral framework and "gravely erode the First Amendment's protections." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-19, at 952 (2d ed. 1988); *see also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 116 (1987) (stating that doctrine "threatens to undermine the very foundation of the content-based/content-neutral distinction").

The reasoning underlying *Renton* quickly infiltrated subsequent cases. In *Boos v. Barry*, 485 U.S. 312 (1988), for instance, the Court invalidated a District of Columbia law that made it illegal to

display any sign bringing a foreign government into disrepute. The government argued that under *Renton* the law was content-neutral because it furthered a neutral government interest, namely "our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The plurality, though, held that *Renton* was distinguishable from the facts in the case because the District's justification "focuses only on the content of the speech and the direct impact that speech has on its listeners." *Id.* at 321. Because the sign ban regulated speech "due to its potential primary impact," the plurality concluded that it was content-based. *Id.*

Albeit dictum, the plurality's analysis implicitly accepted the core idea of the secondary-effects doctrine: *i.e.*, the District's law could be deemed content-neutral, despite expressly discriminating against certain messages, if the District had come up with a purpose that did not rely on the listeners' reaction to speech. Justice Brennan chided the plurality for its attempt to divine legislative motive, noting both that "future litigants are unlikely to be so bold or so forthright" as the District. *Boos*, 485 U.S. at 335 (Brennan, J., concurring in the judgment). He also noted that the secondary-effects doctrine does not provide the "clear guidance" of the traditional test, which turns on the statute's terms rather than motive. *Id.* at 335-36. Yet despite these warnings, the Court's use of the purpose-based test undergirding *Young* and *Renton* threatened to radically transform the very nature of the content-based/content-neutral inquiry. What by all accounts should have been a simple case made good on that threat.

B. *Ward v. Rock Against Racism, Hill v. Colorado,* and the Metastasis of *Renton's* Focus on Legislative Motive.

Ward v. Rock Against Racism, 491 U.S. 781 (1989), unwittingly effected a sea change in this Court's First Amendment jurisprudence. *Ward* involved a content-neutral rule that required the use of city-provided sound equipment and engineering services at concerts performed in a Central Park bandshell. *Id.* at 787. Rock Against Racism, which held yearly events in the bandshell, argued that the requirement violated the First Amendment. *Id.* at 787-88. The district court sustained the regulations, but the Second Circuit reversed, holding that the city had not shown that the rule was the least-restrictive means of addressing the sound problem. *Id.* at 789.

On review, the Supreme Court reversed and upheld the restrictions. The Court could have held that the rule – which applied regardless of what was performed – was content-neutral under *Mosley*'s traditional inquiry. Instead, the Court focused on legislative purpose, holding that "[t]he principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The *government's purpose* is the controlling consideration." *Id.* at 791 (internal citations omitted & emphasis added). The Court then cited *Renton* for the idea that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some

speakers or messages but not others." *Id.* Because the rule's purpose was to protect the tranquility of adjoining areas, the Court determined it was content-neutral. *Id.* at 792-93. And because the "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation," the Court held that the Second Circuit erred in holding that the rule failed because less burdensome alternatives were available. *Id.* at 797.

As Justice Marshall noted in dissent, *Ward* was "the first time [that] a majority of the Court applie[d] *Renton* analysis to a category of speech far afield from that decision's original limited focus." *Id.* at 804 n.1 (Marshall, J., dissenting). The dissenters in *Ward* feared that focusing on legislative purpose rather than a statute's plain meaning might "encourage widespread official censorship" by causing many laws that expressly discriminate against certain messages to be judged under the relatively lax standards of intermediate scrutiny. *Id.* Furthermore, some commentators have noted that by being able to deploy either the traditional test or the *Ward/Renton* purpose-based test, the Court gave itself the discretion to characterize most facially discriminatory laws as either content-based or content-neutral depending upon the circumstances. *See, e.g.*, John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1132 (2005).[6]

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[6] *See also* Christina Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the*

(Continued on following page)

Having two separate tests can also lead to confusion in lower courts, which increases the risk that courts will reach differing results in factually indistinguishable cases. *See* R. George Wright, *Content-Based and Confidential-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 339 (2006) (noting that lower courts "have made little progress in sorting out the respective roles of an examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent in distinguishing between [content-based] and [content-neutral] regulations") (footnotes omitted). As *amicus* shows below, this is more than a risk: this Court's fractured approach to content neutrality has led to deep splits in fundamental areas of First Amendment law.

These concerns intensified following this Court's ruling in *Hill v. Colorado*, 530 U.S. 703 (2000), a law similar to the one at issue in this case. The law in *Hill* prohibited individuals outside medical facilities from approaching people entering the facility to engage in "oral protest, education, or counseling" without first gaining the would-be listener's permission. *Id.* at 707-08. Even though the pre-approval

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Theoretical Abyss, 33 GA. L. REV. 1, 58 (1998) (stating that "purpose terminology occasionally creeps into the Court's free speech decisions – especially when the Court wants to uphold a content-neutral law. Simultaneously, the Court has reiterated its belief that governmental purpose is irrelevant to determining a law's legitimacy – especially when it wants to strike down a law that discriminates against certain speech.").

requirement in *Hill* applied to only certain speakers and subjects, the majority held that the law was content-neutral because its purposes – to protect patient access and privacy – were unrelated to what the demonstrators said. *Id.* at 719-20.

The Court in *Hill* similarly refused to hold that the law was content-based because it required police to determine if one was engaging in "oral protest, education, or counseling." The majority, relying on picketing cases such as *United States v. Grace*, 461 U.S. 171 (1983), held that it was not "improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 721. Given that the Colorado law limited only unconsented approaches for the purpose of "oral protest, education, or counseling," rather than banned such forms of speech altogether, the Court held that the law was content-neutral. *Id.*

Critics of *Hill*'s treatment of the content neutrality issue have been legion. *See, e.g.*, Michael McConnell, 28 PEPP. L. REV. 747, 748 (2000) (stating that if the law in *Hill* "is not content based, I just do not know what 'content-based' could possibly mean"); Kathleen M. Sullivan, *Sex, Money, and Groups*, 28 PEPP. L. REV. 723, 737 (2000) (questioning whether the law in *Hill* was "properly understood as content-neutral at all"); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech about Favored Rights*, 51 AM. U. L. REV. 179, 182 (2001) (criticizing *Hill* for making it easy for governments to engage in viewpoint

discrimination "provided that their enactments maintain the thinnest facade of neutrality"); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. 595, 620 (2003) (criticizing the *Ward/Hill* approach to content neutrality on the grounds that it is "rare that sufficient evidence exists to demonstrate that the purpose of a facially neutral action is content- or viewpoint-based, and that the proffered neutral justification is, in fact, a sham"). But despite this criticism, lower courts have seized upon *Renton/Ward/Hill*'s focus on legislative purpose.

III. The *Renton/Ward/Hill* Purpose-Based Inquiry Has Led Some Courts To Hold That Laws That Turn on the Content of One's Speech Are Content-Neutral.

Since this Court decided *Hill*, federal and state courts have repeatedly been called upon to scrutinize governmental speech restrictions. But due to the doctrinal confusion that *Renton*, *Ward*, and *Hill* have sown, these lower courts have been left without any clear guidance as to how they should determine whether any particular law is content-based or content-neutral. Should they look at whether the law turns on what the would-be speaker says? Or should they focus on whether the government has put forward some neutral justification for the restriction? The answer to these questions, given this Court's vacillation between the two tests, is murky at best. *Compare Holder v. Humanitarian Law Project*, 130

S. Ct. 2705, 2723-24 (2010) (deeming law to be content-based because whether speech of plaintiffs was prohibited "depends on what they say")[7] with *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (holding law prohibiting intentional disclosure of intercepted communications to be content-neutral under *Ward* because its purpose was to protect "the privacy of wire, electronic, and oral communications" rather than to suppress speech).

In light of this uncertainty, some lower courts now view *Ward*'s focus on legislative purpose not just as one way to determine if a law is content-based, but the *only* way. Consequently, these courts classify facially discriminatory laws as content-neutral and uphold them under the much less rigorous test used for time, place, and manner restrictions. As demonstrated below, this Court's conflicted approach to content neutrality has caused federal and state courts to deeply split on whether laws that turn on the content of one's speech, but which are passed for non-censorial reasons, should be subject to strict scrutiny. At the very least, this Court should take care it does not further that confusion in deciding this case.

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[7] It is important to note that, although this Court correctly concluded that the law in *Holder* was content-based, applying *Ward*'s purpose-based test would not have led to the same conclusion. That is because the government's purpose for passing the law was not to suppress speech, but to protect national security by preventing contributions to foreign terrorist organizations.

A. Federal Courts Are Split on Whether Sign Ordinances That Draw Subject Matter Distinctions Are Content-Based or Content-Neutral.

The U.S. Courts of Appeal are deeply embroiled in a conflict concerning municipal sign ordinances. Specifically, the conflict reflects a disagreement on whether a sign ordinance that provides exemptions or otherwise draws distinctions based on subject matter is content-based, regardless of the governmental motive and proffered justification for the ordinance.

On one side of the divide are those courts that have generally employed this Court's traditional approach to the content-based inquiry, as exemplified in cases like *Mosley* and *Carey v. Brown*. In *Neighborhood Enterprises, Inc. v. City of St. Louis*, the Eighth Circuit followed the approach laid out by the *Metromedia* plurality by holding that the city's exemption for certain noncommercial signs, based on what those signs depicted or said, rendered the ordinance content-based. 644 F.3d 728, 736 (8th Cir. 2011) (holding that "the zoning code's definition of 'sign' is impermissibly content-based because 'the message conveyed determines whether the speech is subject to the restriction'") (internal quotation marks and citation omitted). The Eighth Circuit's decision in *Neighborhood Enterprises* echoes earlier decisions from the First, Second, and Eleventh Circuits. *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (holding sign code to be content-based when it forbade political signs but permitted signs

erected for charitable or religious causes); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990) (holding that ordinance's exemption for signs "identifying a grand opening, parade, festival, fund drive or similar occasion" rendered it content-based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005) (concluding that sign code which exempted government flags and insignia of government, religious, charitable and fraternal organizations from regulation to be content-based).

By contrast, the Fourth, Sixth, and Seventh Circuits have held, based on this Court's statements in *Ward* and *Hill*, that an ordinance's exemptions for certain types of noncommercial signs will not render the sign code content-based so long as the government has proffered some content-neutral "justification," or purpose, for the ordinance. *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623-25 (6th Cir. 2009); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-46 (N.D. Ill. 1990), *aff'd*, 1993 WL 64838, at *2 (7th Cir. Mar. 8, 1993) (unreported). In *Wag More Dogs*, for instance, the Fourth Circuit held that Arlington County's sign code was content-neutral because its purpose was "to regulate land use, not to stymie a particular disfavored message." 680 F.3d at 368. It maintained that position even though Arlington's sign code exempted works of decorative art from regulation, holding that "a regulation [must] do more than merely differentiate based on content to

qualify as content based." *Id.* at 365. One year later the Fourth Circuit followed up *Wag More Dogs* with *Brown v. Town of Cary*, 706 F.3d 294, 301-02 (4th Cir. 2013), in which it expressly acknowledged the deep circuit split on the issue and rejected the "absolutist" position taken by the Eighth and Eleventh Circuits.

To add to the confusion, the Third Circuit and Ninth Circuits have developed their own distinct approaches to this issue. The Third Circuit has adopted a "significant relationship" approach. *See Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994). It recognizes that exemptions based on subject matter are content-based, but generally allows such exemptions if (1) there is a significant relationship between the subject matter of the signs allowed by the exemption and the specific location where the exemption applies; (2) the exemption is substantially related to serving an interest that is at least as important as that served by the underlying sign regulation; and (3) the municipality did not include the exemption to censor certain viewpoints or control what issues are appropriate for public debate. *Id.* This rule allows exemptions from general sign bans so long as the exemption is based on a special relationship between the sign and its location.[8]

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[8] Then Judge Alito concurred in *Rappa*, noting that until "the Supreme Court provides further guidance concerning the constitutionality of sign laws [that turn on the content being depicted], I endorse the test set out in the court's opinion." 18 F.3d at 1080 (Alito, J., concurring).

Melrose, Inc. v. City of Pittsburgh, 613 F. 3d 380, 388-89 (3d Cir. 2010) (finding ordinance content-neutral when it permitted identification signs but banned advertising on certain buildings because identification signs "convey their information at the location they are intended to identify," and promote public order by giving information about specific buildings).

The Ninth Circuit's position on the content neutrality issue has changed over time. Initially, the court followed the traditional approach and held that sign laws that exempted certain messages were subject to strict scrutiny. *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 & n.2 (9th Cir. 1988) (holding that, *inter alia*, exception in ordinance for flags "of nonprofit religious, charitable or fraternal organizations" rendered ordinance content-based). But in recent opinions, the Ninth Circuit has held sign codes to be content-neutral despite the presence of "speaker- or event-based" exemptions. Relying on *Hill v. Colorado*, the Ninth Circuit held in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013) that a municipality may exempt signs for certain speakers or during certain "triggering events" (such as elections or home sales) from regulation. *Id.* at 1071-72. Because the town did not adopt its sign code out of disagreement with any particular person's message, the Ninth Circuit held it to be content-neutral even though it required government officials to inspect the would-be speaker's message to decide how it should be regulated. *Id.* (citing *Hill*, 520 U.S. at 719-20).

B. State Courts Also Diverge on Whether Sign Ordinances with Subject Matter Distinctions Are Subject to Strict Scrutiny.

State courts are likewise split in how to scrutinize sign codes that exempt certain noncommercial messages from regulation. Courts in Georgia, Minnesota, New Jersey, Ohio, and Washington have followed the approach of the *Metromedia* plurality and the Eighth and Eleventh Circuit by holding that such exemptions render sign ordinances content-based and subject to strict scrutiny. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays*, 467 S.E.2d 875, 882 (Ga. 1996) (holding that durational limit placed on political signs but not other signs is content-based); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 465 (Minn. Ct. App. 1990); *State v. DeAngelo*, 963 A.2d 1200 (N.J. 2009) (holding sign ordinance to be content-based where it "prohibited the union from displaying a rat balloon, but authorized a similar display as part of a grand opening"); *City of Tipp City v. Dakin*, 929 N.E.2d 484, 499 (Ohio Ct. App. 2010) (stating that exemptions from permit requirement for, among other things, political flags, garage sale signs, and yard signs intended to display "personal" messages rendered sign code content-based); *Collier v. City of Tacoma*, 854 P.2d 1046, 1053 (Wash. 1993) (rejecting *Ward* purpose-based analysis and holding that durational limitation law placed on political signs was content-based).

On the other hand, courts in Michigan and Texas have held that sign laws that expressly regulate certain messages more harshly than others due to their subject matter are content-neutral so long as the purpose for regulation was not to suppress speech. In *Sackllah Investments, LLC v. Charter Township of Northville*, No. 293709, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. Aug. 9, 2011), the Michigan Court of Appeals examined a sign code that exempted, among other things, "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags." *Id.* at *25 n.8. After analyzing the split in the federal circuits on this issue, the court chose to follow the Sixth Circuit's approach in *H.D.V.-Greektown*, 568 F.3d 609, to hold that the law, despite its exemptions, was content-neutral because its purpose is to "eliminat[e] visual clutter to promote aesthetics . . . and to promote traffic safety." *Id.* at *33. *See also Tex. DOT v. Barber*, 111 S.W.3d 86, 94 (Tex. 2003) (applying *Renton* secondary-effects analysis to hold state billboard law to be content-neutral even though it "does make certain distinctions based on subject matter").

IV. The Court Should Use This Case To Instruct Lower Courts That There Are Two Tests for Whether a Law Is Content-Based and That They Should Apply Them Both.

The conflicts that *amicus* has identified have arisen because lower courts mistakenly believe that

Ward's purpose-based inquiry is in fact the only inquiry they must undertake. But recent precedents make clear that this Court continues to categorize laws that turn on the content of one's speech as content-based irrespective of whether they were passed for censorial reasons. *Humanitarian Law Project*, 130 S. Ct. at 2723-24; *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that law's terms rendered it content-based). This Court should remind lower courts of its statement in *Turner Broadcasting System, Inc. v. FCC* that "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." 512 U.S. 622, 642-43 (1994) (citations omitted).

Last year, this Court in *United States v. Jones*, 132 S. Ct. 945 (2012), resolved a similar problem with respect to Fourth Amendment precedent. Traditionally, the government committed a search for Fourth Amendment purposes when it trespassed to gather information. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (discussing property-rights focus of early Fourth Amendment caselaw). But as technology improved, so did the government's ability to conduct surveillance without physically intruding on one's property. In response, the Court in *Katz v. United States* explained that even when the government committed no trespass, it conducted a search for

Fourth Amendment purposes if it infringed on one's "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

The *Katz* reasonable expectation of privacy test quickly became the centerpiece of Fourth Amendment jurisprudence, but it was not without its faults. Most importantly, to the extent a person lacked a reasonable expectation of privacy, *Katz* permitted the government to search without constitutional consequence. *See United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding that monitoring vehicle's movements on public roads was not a search). This was particularly problematic when construing the warrantless placement of GPS tracking devices, which allowed police to know the constant whereabouts of a vehicle for an extended period of time. Some lower courts invoked a modified version of *Katz* that looked at the overall "mosaic" that long-term GPS monitoring painted, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), but most held that no Fourth Amendment search had occurred. *See, e.g.*, *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

The majority in *Jones* resolved this problem by reminding lower courts that *Katz* was not the sole test for whether a search had occurred. 132 S. Ct. at 952. Stating that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test," *id.*, the Court explained that the government committed a search for Fourth Amendment purposes either when it (1)

physically invaded one's property for the purpose of acquiring information, *id.* at 949; or (2) infringed on one's reasonable expectation of privacy. *Id.* at 950. Finding that the former had occurred in Jones' case, the Court held that admitting the evidence that the government had collected violated the Fourth Amendment. *Id.* at 954.

This Court should do for the First Amendment what it did in *Jones* for the Fourth Amendment. *Ward*'s inquiry into legislative purpose was "added to, not substituted for" this Court's traditional test, and speech restrictions are content-based *either* when (1) the restrictions require the government to look at the content of one's speech in determining whether or not it is subject to regulation; or (2) they are motivated by antipathy toward a particular subject matter or viewpoint. By reminding lower courts that both tests exist and they should employ them both, this Court can protect First Amendment rights and ensure that laws that turn on the content of one's speech are judged under the proper standard.

CONCLUSION

More than twenty years ago, this Court said that a law is content-based when "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. But many lower courts now erringly view *Ward* as the sole test for content neutrality, and subject

facially discriminatory laws only to the relatively lax standards meant for time, place, and manner restrictions. That includes the First Circuit, which held that Massachusetts' reproductive facilities act was content-neutral because it served purposes other than suppressing speech. It is possible that the First Circuit could have reached the same result even if it scrutinized the law under the traditional test. But no matter how it affects this particular case, this Court should instruct lower courts that invoking both tests is constitutionally necessary. Only this will ensure that the mistakes of the past are not repeated once again.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
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In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the First Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Massachusetts statute at issue in this case is a constitutional catastrophe. Far from being a reasonable time-place-manner restriction, it is an

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

unreasonable content-based regulation that fails at every critical legal juncture.

ARGUMENT

I. THE STATUTE IS A QUINTESSENTIAL CONTENT-BASED REGULATION THAT SHOULD NOT BE FRAMED AS A TIME-PLACE-MANNER RESTRICTION.

Massachusetts has no power to shut down speech opposing abortion "because of its message, its ideas, its subject matter, or its content." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980), quoting *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). The statute "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

In some legal contexts, examination of content is appropriate in order to apply a rule of law—for example, to determine "whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, [or] a copyright violation." *Hill v. Colorado*, 530 U.S. 703, 721 (2000). But the statute at issue here "is a textbook example of a law which is content based." *Id.* at 766 (Kennedy, J., dissenting). This Court has declined to "carve out from the First Amendment any novel exception" for expression many would find distasteful: *United States v. Stevens*, 130 S. Ct. at 1586 (depictions of animal cruelty); *United States v. Playboy*

Entm't Group, Inc., 529 U.S. 803, 826 (2000) (sexually oriented programming). In the same way, there should be no "novel exception" for peaceful, consensual conversations near an abortion clinic on a public street—a quintessential traditional public forum.

On the surface, the statute may appear to regulate action—standing within 36 feet of an abortion clinic during business hours—rather than speech. But "[t]here comes a point...at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself." *Hill v. Colorado*, 530 U.S. at 745 (Scalia, J., dissenting). This statute passes that point. Its framing as a time-place-manner restriction deceptively conceals its inherent bias. "[T]he fact that a restriction is framed as a regulation of the places where some speech may occur has nothing whatever to do with whether the restriction is content-neutral—which is why *Boos* held to be content-based the ban on displaying, within 500 feet of foreign embassies, banners designed to bring into public odium any foreign government." *Id.* at 748 n.2 (Scalia, J., dissenting), citing *Boos v. Barry*, 485 U.S. 312, 316 (1988). There is an ominous similarity between *Boos* and the ban Massachusetts has enacted. Even more than in *Hill*—where the statute applied to all medical facilities—this statute's place restriction is "a convenient yet obvious mask for the legislature's true purpose and for the prohibition's true effect." *Hill v. Colorado*, 530 U.S. at 767 (Kennedy, J., dissenting). In effect, the statute proscribes speech "only if by persons directly interested who approach the vicinity of [an abortion clinic] to convey information about [abortion]." *Carlson v. California*, 310 U.S. 106, 112 (1940). It does not deal with "secondary effects" or

conduct that might be right proscribed, such as actual harassment or obstruction of traffic, but speech itself.

A. The Statute Restricts Content At The Core Of The First Amendment—Speech About A Matter Of Public Concern.

Invalid content restrictions include even the seemingly innocuous distinction between commercial handbills and conventional newspapers. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). This Court has struck down content-based regulations on depictions of animal cruelty (*United States v. Stevens*, 130 S. Ct. at 1586) and even sexually-oriented entertainment that many find "shabby, offensive, or even ugly" (*United States v. Playboy Entm't Group, Inc.*, 529 U.S. at 826). But where speech involves a matter of public concern, this Court has an even greater duty in light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011), quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Time-place-manner restrictions are subject to a more relaxed level of scrutiny and are generally valid as long as "they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Clark v. Cmty. for*

Creative Non-Violence, 468 U.S. 288, 293 (1984). But this case warrants much more exacting scrutiny because it features *content* at the core of the First Amendment—speech about a matter of public concern. Abortion has generated a heated public debate that has raged over four decades. As the First Circuit admits, "[f]ew subjects have proven more controversial in modern times than the issue of abortion." *McCullen v. Coakley*, 708 F.3d 1, 3 (1st Cir. 2013). By restricting speech on this topic, the statute strikes the "heart of the First Amendment." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997); *Snyder v. Phelps*, 131 S.Ct. at 1215, citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (opinion of Powell, J.) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). A myriad of legal precedent confirms the nation's commitment to protecting this "highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). The First Amendment "'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.' *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 534-535. And as a nation, we protect "even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S.Ct. at 1220. The "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 1216, quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

The speech-chilling restrictions of the statute are not among the "reasonable steps" a state may lawfully take "to ensure the safe passage of persons wishing to

enter healthcare facilities." *McCullen v. Coakley*, 708 F.3d at 3. Petitioners seek to engage in peaceful, consensual conversations on public streets—not obstruction, harassment, or raucous protest. The statute is a thinly veiled effort to silence one side of the abortion debate—to suppress Petitioners' speech "precisely because" they address a particular matter of public concern. *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 536. In spite of Massachusetts' attempt to camouflage its law as a "content-neutral" time-place-manner restriction, Petitioners are silenced because of the content of their speech—content entitled to the very highest level of First Amendment protection because it touches a matter of public concern.

B. The Statute Shuts Down Consensual Communication On One Side Of A Heated Public Debate—Serving An Improper Government Purpose.

Government purpose is a threshold consideration in evaluating content neutrality and its impact on the constitutionality of a statute. The First Circuit cites public safety as the rationale for the Massachusetts statute—concluding that the regulation is therefore "both speaker-neutral and content-neutral." *McCullen v. Coakley*, 708 F.3d at 8. The same motive was cited for the predecessor statute, along with concerns about traffic flow and congestion. *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"). But the Court hints that the First Amendment may operate differently in the context of abortion:

> It would make no sense to wrest *Gilleo* from its contextual moorings and use it as a wedge to

> subvert the Court's later decisions addressed to the much *different problem of how the First Amendment operates when the special concerns of public-sidewalk protests around abortion clinics are at stake.*

McCullen v. Coakley, 708 F.3d at 14 (emphasis added). This comment is deeply disturbing. Cases are often distinguished on their particular facts, but the First Circuit suggests that *abortion-related speech* is subject to a different standard under the First Amendment. Content neutrality—or rather the lack thereof–demands closer examination to determine whether the public safety rationale squares with the actual operation of the statute.

Legitimate Purposes. Some purposes would ordinarily not reveal an illicit government intent to suppress speech. The government may take reasonable steps to ensure public safety and facilitate the free flow of traffic on public streets and sidewalks. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994). The state has a valid interest in not disrupting patient care inside a medical facility. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). "Secondary effects" of speech may be proscribed—including physical threats or physically threatening approaches (*Hill v. Colorado*, 530 U.S. at 747 (Scalia, J., dissenting))—and actual crime. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. at 815. But "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic U.S. Const. amend. I principles." *Id.* at 812. Courts view a content-based

regulation with suspicion even where it "can somehow be described as a burden rather than outright suppression." *Id.* at 826.

Core Inquiry? According to *Ward*, "[t]he government's purpose is the controlling consideration...[t]he principal inquiry in determining content neutrality." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If government regulation is "justified without reference to the content of the regulated speech," it is presumably content neutral. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. at 293. *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. at 763 (government motive is the "principal inquiry"); *R. A. V. v. St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."); *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2007) ("*McGuire II*") ("the core inquiry" is "whether the legislative reason for the law is content neutral"). This principle holds even if a regulation has an "incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791; *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). In *Hill*, the legislature heard testimony about various types of protests that created difficulties for persons entering medical facilities—not only about abortion, but animal rights and other matters. *Hill v. Colorado*, 530 U.S. at 710 n. 6.

But the focus on legislative motive merits this Court's reconsideration. "Our cases have consistently held that 'illicit legislative intent is not the sine qua non of a violation of the First Amendment.'" *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims*

Bd., 502 U.S. 105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Justice Marshall's dissenting opinion in *Cmty. for Creative Non-Violence* raised some important concerns about the potential for "latent inequality," observing that "content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity...a content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of view." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. at 313 (Marshall, J., dissenting). A "two-tiered approach" has been created that erodes First Amendment protection for expression so long as the government's motive appears to be content-neutral:

> The Court...has transformed the ban against content distinctions from a floor that offers all persons at least equal liberty under the First Amendment into a ceiling that restricts persons to the protection of First Amendment equality—but nothing more. The consistent imposition of silence upon all may fulfill the dictates of an evenhanded content-neutrality. But it offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266, 270 (1964).

Clark v. Cmty. for Creative Non-Violence, 468 U.S. at 313-314 (Marshall, J., dissenting). "The Court's salutary skepticism of governmental decision making in First Amendment matters suddenly dissipates once

it determines that a restriction is not content-based." *Id.* at 314-315.

This Court may have recaptured some of that "salutary skepticism." In *Discovery Network*, this Court appears to qualify the content-based test for time-place-manner restrictions by considering the actual operation of the law, rather than a "tunnel vision" approach that short-circuits the analysis if the government can recite some outwardly neutral rationale. As the Eleventh Circuit observed, "the Court has receded from this formulation ["[t]he government's purpose is the controlling consideration," citing *Ward*, 491 U.S. at 791], returning to its focus on the law's own terms, rather than its justification, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 n. 8 (11th Cir. 2005). In *Discovery Network*, a city's regulation of newsracks appeared on the surface to be justified by a content-neutral interest in safety and aesthetics, yet "the very basis for the regulation [was] the difference in content between ordinary newspapers and commercial speech." *Discovery Network, Inc.*, 507 U.S. at 429. Citing its own recent precedent, this Court observed that "just last Term we expressly rejected the argument that discriminatory...treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.*, citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. at 117. In *Discovery Network*, the city had "limited (to zero) the number of newsracks *distributing commercial publications*." *Discovery Network, Inc.*, 507 U.S. at 429 (emphasis in original). In this case, Massachusetts has "limited (to zero) the number of"

speakers who are able to advocate against abortion on public streets within the buffer zones. It is insufficient for the state to recite a seemingly content-neutral motive that masks an inherent discrimination. Even if Massachusetts did not act with animus or discriminatory intent, the statute absolutely does suppress certain ideas.

Exemptions. In *Hoye,* the Ninth Circuit found that "Oakland appears to have read into its Ordinance an exception for speech that facilitates access to reproductive health services," thus suppressing speech on the basis of content. *Hoye v. City of Oakland*, 653 F.3d 835, 843 (9th Cir. 2011). Massachusetts has codified what Oakland merely "read into" its law, carving content discrimination in statutory stone. As Petitioners have noted, the exemption for clinic workers—who by definition are virtually certain not to advocate against abortion in the scope of their employment—and their exclusion from the regulation "may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 785-786 (1978)." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994).

Exemptions may also "diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52. Here, it is not clear why peaceful, consensual conversations on a public sidewalk would endanger public safety or impede traffic. "[T]he [statute] in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control." *Carlson v. California,* 310 U.S. at 113.

"Protection" for Unwilling Listeners. The First Circuit discloses a patently improper purpose for the statute—far removed from the alleged interest in public safety:

> In the context of abortion-related demonstrations, the Supreme Court has specifically recognized the interest of clinic patients both "in avoiding unwanted communication" and "pass[ing] without obstruction." See *Hill*, 530 U.S. at 716-18 (internal quotation marks omitted).

McCullen v. Coakley, 708 F.3d at 14.

The Colorado statute in *Hill* applied solely to unwilling listeners—as this Court repeatedly emphasized. *Hill v. Colorado*, 530 U.S. at 715-716, 727. Even that purpose grates against decades of First Amendment precedent. "[I]f protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter." *Id.* at 748-749 (Scalia, J., dissenting).

Listeners are generally responsible to shield themselves from speech they do not want to hear. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. at 813 ("[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 (1975). Even this Court's abortion jurisprudence confirms this basic principle. *Schenck v. Pro-Choice*

Network, 519 U.S. at 383 ("in public debate our own citizens must tolerate insulting, and even outrageous, speech"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. at 773 (clinic can pull its curtains to avoid seeing disagreeable images). Only in rare circumstances has this Court applied a "captive audience" doctrine to speech "so intrusive that the unwilling audience cannot avoid it." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (protecting the privacy and tranquility of a private residence); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (neighborhood residents disturbed by the raucous broadcasts from a passing sound truck); *Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970) (upholding statute allowing homeowners to restrict delivery of offensive mail).

But contrary to fundamental First Amendment principles, there is a downward jurisprudential slide. Prior to *Hill*, this Court invalidated a "no approach" zone, affirming the rights of speakers whose words could not be independently proscribed as "fighting words" or threats:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.

Madsen v. Women's Health Center, Inc., 512 U.S. at 774. *Hill* took a step further down the slope than *Madsen*, upholding a consent requirement and thereby "plac[ing] our free speech traditions in grave jeopardy by licensing legislatures to adopt 'bright-line

prophylactic rules...to provide protection' to unwilling listeners in a quintessential public forum." *Hill v. Colorado*, 530 U.S. at 778 (Kennedy, J., dissenting). But even *Hill* did not disturb the time-honored right to communicate peacefully with *willing* listeners:

> [T]he First Amendment protects the right of every citizen to "'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)." *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). The Colorado statute adequately protects those rights.

Hill v. Colorado, 530 U.S. at 728. The Massachusetts statute breaks all ties with the First Amendment. It prohibits even peaceful, consensual communication—and actually compels Petitioners to adopt louder, far more intrusive means in order to reach their intended audience.

C. The Statute Is "Narrowly Tailored" To Eliminate The Content On One Side Of A Hotly Contested Public Matter.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)." *Frisby v. Schultz*, 487 U.S. at 485. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). In *Ward*, this Court upheld guidelines that did not ban all concerts, or even

all rock concerts, but rather "focuse[d] on the source of the evils the city [sought] to eliminate—excessive and inadequate sound amplification." *Ward v. Rock Against Racism*, 491 U.S. at 800 n. 7. *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. at 772-773 (upholding limited noise restrictions to ensure safety of patients in the clinic). In *Schenck*, this Court struck down floating buffer zones that prevented "communicating a message from a normal conversational distance"—an extraordinarily broad prohibition of protected speech in a traditional public forum. *Schenck v. Pro-Choice Network*, 519 U.S. at 377. The same is true here.

The Massachusetts statute is misdirected. The state has brazenly "assume[d] that *all* those who wish to speak outside health care facilities across the State will...abuse their rights if permitted to exercise them." *Hill v. Colorado*, 530 U.S. at 761 (Scalia, J., dissenting). The restriction precisely targets and eliminates the "evil" of consensual pro-life communication in the vicinity of abortion clinics—shutting off speech on only one side of a heated public debate. Even the statute in *Hill* applied at all medical clinics.

Moreover, it is difficult to see how the government's stated interest in public safety is furthered at all by the broad ban on peaceful conversations—let alone "achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). *See United States v. Grace*, 461 U.S. 171, 182 (1983) ("There is no suggestion...that appellees' activities in any way obstructed the sidewalks or access to the

building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds.") Available alternatives—sound amplification, shouting from a distance, dressing at the "Grim Reaper"—are more intrusive and more likely to create a public disturbance than private peaceful conversation. Actual threats to public safety can be adequately addressed through application of criminal and tort law. "It is beyond dispute that pinching or shoving or hitting is a battery actionable under the criminal law...[and] [s]tate courts have also found an actionable tort when there is a touching, done in an offensive manner." *Hill v. Colorado*, 530 U.S. at 777 (Kennedy, J., dissenting).

D. The Statute Cuts Off Access To The Speakers' Intended Audience—Leaving Only Inadequate, Ineffective Alternatives.

The statute renders it virtually impossible for Petitioners to reach their intended audience in any effective manner. The alternatives are patently ineffective and inadequate—contrary to constitutional requirements:

> While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid *if the remaining modes of communication are inadequate*.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (emphasis added).

"The means of expression at stake here are of controlling importance." *Hill v. Colorado*, 530 U.S. at 899 (Kennedy, J., dissenting). Although Petitioners may shout from a distance, hold signs, and wear costumes, such insensitive tactics are futile—in sharp contrast to the quiet, private conversations that may effectively reach women at this critical point. Petitioners have alternatives in theory, but not in practice—women seeking abortions are not effectively persuaded by shouting, demonstrations, and signs. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (striking down prohibition on signs advertising homes for sale, because "[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like").

The alternatives available to Petitioners are inadequate at best and counter-productive at worst. But even if there were viable alternatives, this Court "[has] consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 541 n.10 (collecting cases). The Massachusetts statute is transparently content-based. It targets speakers who hold a particular viewpoint about abortion and shuts down peaceful, consensual conversations on a public street about a matter of urgent public concern. This law is fatally flawed and cannot withstand constitutional scrutiny.

II. THE STATUTE IS AN *UNREASONABLE* TIME-PLACE-MANNER RESTRICTION THAT CUTS OFF ACCESS TO THE SPEAKERS' INTENDED AUDIENCE.

Even if this Court indulges the state's characterization of its law as a time-place-manner restriction, the statute cannot stand. Just as in *Hill*:

> [Petitioners] want to engage in peaceful face-to-face communication with individuals the petitioners believe are about to commit a profound moral wrong. Without the ability to interact in person, however momentarily, with a clinic patron near the very place where a woman might elect to receive an abortion, the statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression.

Hill v. Colorado, 530 U.S. at 780 (Kennedy, J., dissenting). The facts in *McCullen* are even more compelling than in *Hill*. There is even greater reason to conclude that "[t]he *Ward* time, place, and manner analysis is simply inapplicable to this law." *Id.* at 770 (Kennedy, J., dissenting). Even if it did apply—the statute imposes patently unreasonable conditions on the time *and* the place *and* the manner in which Petitioners may attempt to reach their audience, virtually foreclosing the possibility of effective communication. As the Ninth Circuit recently observed, "government may not favor speakers on one side of a public debate, and...government must not substantially foreclose, as a practical matter, speakers' ability to communicate their message." *Hoye v. City of*

Oakland, 653 F.3d at 849. Massachusetts has violated both of these basic principles.

A. The Statute Is An Unreasonable *Time* Restriction—Silencing Speakers At The Only *Time* They Can Reach Their Intended Audience.

The operation of the statute at the prescribed time will "effectively foreclose [Petitioners'] ability to communicate their message." *Hoye v. City of Oakland*, 653 F.3d at 843. The statute provides in relevant part that:

> The provisions of subsection (b) *shall only take effect during a facility's business hours* and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

Mass. Gen. Laws ch. 266, § 120E 1/2(c) (emphasis added). These are exactly the hours—the *only* hours—when Petitioners' intended audience can be identified and reached. Courts have considered and rejected other similarly targeted time constraints:

- *Knowles v. City of Waco,* 462 F.3d 430, 433 (5th Cir. 2006) (hours for effective protest around abortion clinic near a school coincided with school hours, "precisely when the School Zone ordinance's potential ban is in effect");

- *Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1557-1558 (7th Cir. 1986) (striking down ordinance that limited door-to-door

solicitations to hours between 9 a.m. and 5 p.m., Monday through Saturday—mail and telephone were more expensive and less effective);

- *Wisconsin Action Coalition v. Kenosha*, 767 F.2d 1248, 1257-1558 (7th Cir. 1985) (ordinance that prohibited residential solicitations between 8:00 p.m. and 8:00 a.m. was struck down, as applied, between 8:00 p.m. and 9 p.m.—the time frame when the Coalition received about one-quarter of its donations).

B. The Statute Is An Unreasonable *Place* Restriction—Silencing Speakers At The Only *Place* They Can Reach Their Intended Audience.

This statute effectively creates a "no trespassing" or "First Amendment Free Zone" (*Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)) inside a quintessential traditional public forum—shutting off Petitioners' access to their intended audience, distorting their message and radically altering their ability to communicate even with willing listeners. The restriction prohibits even peaceful, consensual conversations—far surpassing the scheme this Court approved in *Hill*.

Petitioners unquestionably speak in a traditional public forum—"space [that] occupies a special position in terms of First Amendment protection. *United States v. Grace*, 461 U.S. 171, 180 (1983)." *Snyder v. Phelps*, 131 S.Ct. at 1218 (internal quotation marks omitted).

> The Act states in pertinent part that "[n]o person shall knowingly enter or remain on a *public way or sidewalk* adjacent to a reproductive health care facility" (RHCF) within a designated and clearly marked [thirty-five-foot] buffer zone. Mass. Gen. Laws ch. 266, § 120E 1/2(b), (c).

McCullen v. Coakley, 708 F.3d at 3 (emphasis added). The statutory "speech-free" zone exists solely "around the entrances, exits, and driveways of abortion clinics" (*id.*)—nowhere else—and exempts persons (clinic employees) who would risk their jobs if they dared to speak against abortion in that zone. The statue cuts a hole in the First Amendment, even if Petitioners can broadcast the same message in some other *place* away from the clinics:

> [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

United States v. Grace, 461 U.S. at 185, quoting *Schneider v. State*, 308 U.S. 147, 163 (1939).

Massachusetts wanders far beyond *Hill's* contours, removing even the "convenient yet obvious mask" of applying restrictions to all medical facilities. *Hill v. Colorado*, 530 U.S. at 767 (Kennedy, J., dissenting). The *Hill* majority observed that "the comprehensiveness of the statute" was "a virtue, not a vice, because it [was] evidence against there being a

discriminatory governmental motive." *Id.* at 731. Massachusetts rips off the mask and exposes the underlying content-based bias. Moreover, the 8-foot zone in *Hill*, "unlike the 15-foot zone in *Schenck*...allow[ed] the speaker to communicate at a normal conversational distance." *Id.* at 726-727. The 35-foot buffer zone in Massachusetts renders normal conversation impossible. The *Hill* majority also distinguished *Schenck* and *Madsen* in that "particular speakers were at times completely banned within certain zones" in those cases. *Id.* at 733-734. Here, speakers who oppose abortion are completely banned within the statutory buffer zones. If their First Amendment activities presented any real danger to the public, "the statute should apply to every building entrance in the State" but "[i]t does not." *Id.* at 767 (Kennedy, J., dissenting).

The place where speech occurs may have special relevance. It may represent "the object of protest, the seat of authority against which the protest is directed" or —as in this case—it may be "the place is where the relevant audience may be found." *Galvin v. Hay,* 374 F.3d 739, 747 (9th Cir. 2004), quoting *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir. 1968) (antiwar protest was directed "to the general public and to a special audience – servicemen traveling to and from their bases, particularly buses arriving from Fort Dix"). Case law abounds with examples:

- *Schenck v. Pro-Choice Network*, 519 U.S. at 362 (facilities where abortions were performed)

- *Foti v. City of Menlo Park*, 146 F.3d 629, 633 (9th Cir. 1998) (leaflets handed out on public

sidewalk in front of a Planned Parenthood facility)

- *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1147 (9th Cir. 2003) (union representatives distributed handbills to customers outside Disney Store)

- *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1066 (S.D.N.Y. 1990) (alternative protest location was inadequate because it permitted "only a glimpse of the northern corner of [Gracie] Mansion" where the intended audience was located)

Here, the place is critical to Petitioners' ability to reach their intended audience—women on the verge of undergoing an abortion.

Speech may be irreparably distorted by a regulation of the place. "[T]here is a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that are critical to the content of their message." *Galvin v. Hay*, 374 F.3d at 752. In *Galvin* the location was part of the *content* of the speech rather than the place where the intended audience could be found—placing them in the park's "First Amendment zone" distorted their message. But pushing Petitioners away from the women entering abortions clinics distorts their message by forcing them to shout, hold signs or wear costumes ("dressing up as, say, the Grim Reaper"). Admittedly, "the Act curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles." *McCullen v.*

Coakley, 708 F.3d at 13. Such distortion of Petitioners' message is constitutionally unacceptable. Some of this Court's holdings in the mid-1960's civil rights cases illustrate the link between a message and the place where it is spoken:

- *Brown v. Louisiana*, 383 U.S. 131, 139 (1966) (demonstrators quietly sat and stood in public library reading room to protest segregation)

- *Cox v. Louisiana*, 379 U.S. 559, 560, 566, 575 (1965) (pickets and parades near Louisiana courthouse where students' trial would take place)

- *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (peaceful assembly near site of State Government to express grievances about racially discriminatory laws)

In these cases, this Court "implicitly recognized [the] critical connection between message and public locations." *Galvin v. Hay*, 374 F.3d at 752 n. 9.

There are a few limited locations where targeted protests can be restricted. *Snyder v. Phelps*, 131 S.Ct. at 1218. The immediate vicinity of a private residence is a prime example. *Cohen v. California*, 403 U.S. at 21-22; *Frisby v. Schultz*, 487 U.S. at 477. A carefully crafted injunction also differs from a generally applicable statute:

> [A] statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed

> at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

Madsen v. Women's Health Center, Inc., 512 U.S. at 778 (Stevens, J., concurring in part and dissenting in part). The restriction at issue in this case is precisely the type of statute Justice Stevens predicted "would probably violate the First Amendment"—not an injunction responding to disruptive or other unlawful conduct.

Finally—and most importantly—"[t]he public forum involved here...has become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion." *Hill v. Colorado*, 530 U.S. at 763 (Scalia, J., dissenting). The public space outside abortion clinics is "the most effective place, if not the only place" where peaceful persuasion can occur. *Id.* "It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." *Id.* at 789 (Kennedy, J., dissenting). If Petitioners' speech "is to be effective, [it] must take place *at the very time and place* a grievous moral wrong, in their view, is about to occur." *Id.* at 792 (Kennedy, J., dissenting) (emphasis added). Massachusetts has placed unreasonable restrictions on both the time and the place where Petitioners may speak to their intended audience.

C. The Statute Is An Unreasonable *Manner* Restriction—Rendering It Impossible For The Speakers To Reach Their Intended Audience In An Effective Manner.

Petitioners have determined from past experience that peaceful conversations with willing listeners—not loud, raucous protests from a distance—are the best means to convey their message effectively. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 790-791 (1988). The Constitution "protects [citizens'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). It is the speaker—not the government—who generally has the "right to tailor the speech." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). *See also Cohen v. California*, 403 U.S. at 25 ("It is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

Sometimes the manner is truly unreasonable: "No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 536. Some restrictions implicate reasonable regulation of expressive conduct: *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. at 294 (upholding conditions of a permit that allowed the erection of two symbolic tent

cities to demonstrate the plight of the homeless, but prohibited overnight sleeping in the tents). But the Massachusetts statute grates against the First Amendment—it chills pure speech, preventing peaceful, consensual communication this Court has protected in the other contexts: *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (recognizing the importance of "direct and spontaneous communication" between CPA's and prospective clients, or other seller-buyer solicitation); *Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993) (invalidating ban on peaceful begging in public places). The statute actually compels Petitioners to either be silent or adopt a louder, more intrusive manner that is almost certain to cut off effective communication:

> [T]he Court must know that most of the "counseling" and "educating" likely to take place outside a health care facility cannot be done at a distance and at a high-decibel level. The availability of a powerful amplification system will be of little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart.

Hill v. Colorado, 530 U.S. at 757 (Scalia, J., dissenting). As in *Hill*, the statute fails to restrict protesters "intent on bullying or frightening women...bullhorns and screaming from [thirty-five] feet away will serve their purposes well." *Id.* at 763 (Scalia, J., dissenting). The restriction only deters "those who would accomplish their moral and religious objectives by peaceful and civil means." *Id.*

This Court should not uphold a statute that is even more deeply flawed than the Colorado law approved in *Hill*:

> The Court's holding contradicts more than a half century of well-established First Amendment principles. For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.

Id. at 765 (Kennedy, J., dissenting). This Court should not make the same mistake a *second* time.

III. THE FIRST CIRCUIT'S "STATE ACTION" ARGUMENT IS A RED HERRING THAT MASKS THE STATUTE'S CONSTITUTIONAL FLAWS.

The First Circuit skirts the constitutional flaws in the statute with its claim that "the employees and agents about whom the plaintiffs complain are not state actors but—unlike the municipal police officers in *Hoye*—are agents of a private entity (Planned Parenthood)." *McCullen v. Coakley*, 708 F.3d at 10. In describing Oakland's enforcement policy as "the epitome of a content-based restriction," *Hoye* explained that "[t]he City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral." *Hoye v. City of Oakland*, 653 F.3d at 851. In *Hoye*, the City's enforcement policy constituted state action. This case is not about enforcement efforts—either by the state or clinic representatives—but the statutory distinction

"between speech that facilitates access to clinics and speech that discourages access is not content-neutral." *Id.* As the First Circuit acknowledged—citing this Court's precedent:

> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982) ("While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action," and acts done under the authority of that statute can be considered state action if the acts are done jointly by private and state actors).

McGuire II, 386 F.3d at 60. Moreover, Petitioners are not complaining about "private pro-choice persons [who] are engaging in acts that are illegal under the statute" (*id.*)—but rather content-based speech by such persons that is expressly lawful under the statute. The statutory scheme itself is flawed—and that is "obviously...the product of state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982).

CONCLUSION

Speech opposing abortion has become a constitutional stepchild subject to rules that would be patently unconstitutional in any other context. *Amicus curiae* urges this Court to reverse the deeply flawed First Circuit decision and apply the First Amendment consistently in all contexts.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, MARK BASHOUR, AND NANCY CLARK,

PETITIONERS

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, EL AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty law professors whose scholarship and teaching focus on constitutional law and health law.[2] Many of the *amici* have devoted much of their careers to the First Amendment, health, family, and gender issues relevant to this case. The subject matters of the courses they teach and their publications include constitutional law and theory, First Amendment law, law and religion, civil rights, family law, gender and the law, and public health law. *Amici* believe that this case presents important First Amendment issues concerning the distinction between the permissible regulation of conduct and the impermissible regulation of speech, the role of assessing legislative purpose in determining the constitutionality of a statute, and the narrow area in which the First Amendment allows free speech to yield to the government's substantial interest in public safety and protecting the exercise of a competing constitutional right.

SUMMARY OF ARGUMENT

Faced with a history of violence and obstruction at reproductive health care facilities, the Massachusetts legislature enacted a law limiting foot traffic

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[1] This brief is filed with the consent of the parties. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

[2] See Appendix A for a list of *amici curiae*.

within a 35-foot radius of facility entrances. G. L. c. 266, § 120E½ (the "Act"). Petitioners claim a constitutional right to stand within the designated entrance areas in order to urge patients entering the facilities not to terminate their pregnancies. Their claim raises important First Amendment issues concerning the distinction between the permissible regulation of conduct and the impermissible regulation of speech.

Government regulation based on the content or viewpoint of political or religious advocacy violates fundamental First Amendment principles, principles that must be applied without fear or favor of any political, religious, or interest group. Government regulation of conduct is subject to similar constraints: it must not wax and wane depending upon the righteousness of a specific speaker's beliefs, or sympathy to a particular speaker's cause, be it political, religious or moral. In this case, *amici* respectfully submit that the Act properly is viewed as a regulation of conduct that imposes incidental burdens on speech subject to review under the standard articulated in *O'Brien v. United States*, 391 U.S. 367 (1968).

First, the Act is based on an extensive evidentiary record demonstrating that it serves an important public safety purpose unrelated to the suppression of speech—protecting the constitutionally protected right of women to reproductive health care free from interference or intimidation. The fact that Petitioners devoutly wish to stand in the entrances to medical facilities in order to advocate for their religious and moral beliefs does not immunize them from generally applicable regulations of conduct enacted to address significant public safety concerns.

Second, significant differences between the Act and the statute in *Hill v. Colorado*, 530 U.S. 703

(2000)—differences ignored by Petitioners and their *amici*—make this case an unsuitable vehicle to reconsider *Hill*. Unlike the statute in *Hill*, the Act does not depend upon an assessment of the content of any person's speech or manner of expression. Would-be speakers of all viewpoints on all topics are subject to the same foot traffic regulation within a 35-foot radius of entrances to reproductive health care facilities. Whether pro-life or pro-choice (or neither), they are prohibited from entering or remaining in that designated entrance zone except for the purpose of moving from one perimeter of the zone to another (as Petitioners and all others are free to do). The Act is a non-discriminatory regulation of conduct significantly more protective of First Amendment interests than the statute upheld in *Hill*.

Finally, even if the Act is subject to strict scrutiny, it should be upheld as a narrowly tailored means of accommodating the competing public safety interest of protecting the constitutional interest of women to freely exercise their right to reproductive freedom, a regulation comparable to the polling place buffer zone upheld in *Burson v. Freeman*, 504 U.S. 191 (1992).

ARGUMENT

I. The Act Is a Content-Neutral Regulation of Conduct.

The proper starting point in discerning whether the Act regulates content or conduct is the statutory text. The Act prohibits "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" of such a facility. Mass. G.L. c. 266, § 120E½(b). Although Petitioners claim that the Act prohibits would-

be speakers from "set[ting] foot within the marked zones," *see* Petitioner's Br. 4,[3] the Act expressly allows *all* persons—including Petitioners—to freely enter the zone from one side of the perimeter in order to cross over to another side of the perimeter. *See* Mass. G.L. c. 266, § 120E½(b)(1) and (4) (exempting "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility").

The Act regulates conduct—entering and remaining within a fixed 35-foot buffer zone. Accordingly, the proper standard of review is established by *O'Brien v. United States*, 391 U.S. 367 (1968), and its progeny. *See, e.g., Rumsfeld v. Forum for Academic & Constitutional Rights*, 547 U.S. 47 (2006); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (plurality). This line of cases establishes that First Amendment protection does not extend to conduct unless it is inherently expressive. *O'Brien*, 391 U.S. at 375 (upholding statute criminalizing the knowing destruction of a draft card because "there is nothing necessarily expressive about such conduct"); *Forum for Academic & Constitutional Rights*, 547 U.S. at 66 (upholding statute requiring universities to give all recruiters equal access because distinguishing between military recruiters and other recruiters is not "inherently expressive" conduct); *Pap's A.M.*, 529 U.S. at 290 (upholding ordinance banning all public nudity, "regardless of whether that nudity is accompanied by expressive activity"). As shown below, because the Act regulates conduct with only an incidental burden

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[3] *See also id.* at 27 (claiming that "the Act prohibits speakers (other than clinic agents) from entering its restricted zones at all").

on speech no greater than essential to promote a substantial government interest, it is constitutional under *O'Brien*.

A. The Act Regulates Conduct with Only an Incidental Burden on Speech.

Regulating whether people may stand within a 35-foot radius of reproductive health care facilities is inherently a regulation of conduct, not speech. First Amendment scholar Eugene Volokh has explained that "[s]peech and conduct—or more precisely the speech and nonspeech elements of some behavior—should indeed be distinguished" and that "the nonspeech elements may be much more heavily regulated." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Unchartered Zone*, 90 CORNELL L. REV. 1277, 1284 (2005). According to Professor Volokh, the critical distinction drawn by *O'Brien* between content-neutral and content-based speech restrictions is that "[e]xpression can generally be regulated to prevent harms that flow from its noncommunicative elements (noise, traffic obstruction, and the like), but not harms that flow from what the expression expresses." *Id.* (footnote omitted).

The Massachusetts Act targets traffic obstruction, a noncommunicative element of passing through or occupying the space within 35 feet of a reproductive health facility. Nothing about this behavior, standing alone, conveys agreement or disagreement with abortion or any other issue related to reproductive health. Like destroying a draft card or denying military recruiters access to a law school campus, the act of walking by or standing outside a reproductive facility is expressive only when accompanied by speech. Because the Massachusetts Act regulates such movement regardless of whether it is engaged in

for the purpose of expressing a view, it is content neutral on its face. *O'Brien*, 391 U.S. at 375 (upholding statute because it did not punish only those who destroyed draft cards for the purpose of expressing their views); *Forum for Academic & Constitutional Rights*, 547 U.S. at 60 (statute regulated conduct not speech as it "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*") (emphasis in original).

None of this is to suggest that regulations of conduct have no effect on speech activities. The statute at issue in *O'Brien*, for example, punished the defendant for attempting to influence others to adopt his antiwar beliefs "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position." 391 U.S. at 370. The Act, too, has an incidental burden on speech. But neither the statute in *O'Brien* nor the Act in this case burdened expression to prevent "harms that flow from what the expression expresses." Volokh, *supra*, at 1284. The Act is concerned with the harms to citizens trying to access medical care that flow from traffic obstruction. Standing outside a medical facility, like burning a draft card, is "in no respect inevitably or necessarily expressive," no matter what the intentions of any particular actor. 391 U.S. at 384-385.

An incidental burden on speech is "no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Forum for Academic & Constitutional Rights*, 547 U.S. at 67. The Massachusetts Act satisfies this requirement. Ensuring safe access to reproductive health

care facilities promotes a substantial government interest in protecting public health, including treatment and prevention of sexually transmitted diseases, early detection of breast cancer and cervical cancer, prenatal care, and family planning. The record establishes that the Commonwealth's previous efforts and regulations were not successful in achieving that public health objective. The question is not whether Petitioners or their *amici* or the Court can imagine a less burdensome alternative, but rather whether, absent the regulation, the government's interest would be achieved less effectively. *Id.* That is proven to be the case.

Petitioners' challenges to the sufficiency of the record, moreover, are unpersuasive. The Commonwealth is entitled to "sufficient leeway" to justify a content-neutral law that regulates conduct, not First Amendment expression. *Pap's A.M.*, 529 U.S. at 298-299; *see also Forum for Academic & Constitutional Rights*, 547 U.S. at 67 (rejecting argument that government failed to produce evidence establishing that the law was necessary and effective). In *O'Brien*, where the statute had an undeniable effect on free speech interests, the Court did not require proof that the Selective Service System could not function without criminalizing the knowing destruction of draft cards (or that the government had no other means—such as its own books and records—to determine who was eligible and registered for the draft). 391 U.S. at 382. The legislative record in this case is well developed and entitled to no less deference.[4]

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[4] Petitioners' statement that law enforcement officials "*claimed* in testimony before the legislature that protestors outside clinics were 'breaking the [no-approach] law

B. Challenges to the Act's Alleged Purpose and Effect Lack Merit.

Petitioners and several *amici* contend that the Act is a content or viewpoint discriminatory law for two reasons. First, its *actual* purpose allegedly is to suppress, or at least disadvantage, speech on the subject of abortion, specifically anti-abortion speech. And second, by restricting speech outside the particular location of reproductive health facilities, the purported effect of the law is to burden speech on only one side of the debate, the anti-abortion side. This reasoning, reduced to essentials, urges the Court to go behind the facial neutrality of a generally applicable law and conclude that the government's interest in providing safe access to reproductive health centers is nothing more than a pretext for suppressing anti-abortion speech. Adopting this approach would contravene well-established First Amendment principles and create considerable uncertainty and confusion for states formulating laws based on those principles.

This Court repeatedly has declined requests like Petitioners' to evaluate whether the legislature's *true* purpose is wrongful. "Inquiries into congressional motives or purposes are a hazardous matter." *O'Brien*, 391 U.S. at 383. Thus, it is a fundamental

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on a routine basis'" illustrates the point. Petitioners' Br. 7 (emphasis added). The testimony of those law enforcement officials is entitled to respect as evidence, not treated like a team line in a debating match. In this case, the evidence showed that the Act was intended to serve an important public safety interest unrelated to the suppression of speech and that, once enacted, it effectively served that interest.

principle of constitutional law that the judiciary may "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.*

Petitioners' argument suffers from the same flaw as the arguments made by the petitioner in *O'Brien*. Like Petitioners here, O'Brien argued that because the statute affected only one side of debate—the anti-war side—Congress's purpose must have been to suppress speech with which it disagreed. Giving that argument no countenance, the Court stated that the statute had "no such inevitable constitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive." 391 U.S. at 384-385. If, as *O'Brien* teaches, burning a draft card is not "inevitably or necessarily expressive," then neither is the act of standing within a 35-foot radius of a health care facility.

In *Pap's A.M.*, the Court again rejected an attack on the legislative purpose behind a content-neutral restriction on conduct. Operators of an erotic dancing establishment challenged a city ordinance proscribing nudity in public places as unconstitutional because its "actual purpose" was to prohibit the expressive activity of nude erotic dancing. 529 U.S. at 290. Although the preamble explained that the ordinance's purpose, in part, was to limit the recent increase in nude live entertainment, it stated that the ordinance aimed to combat the harmful impact of public nudity on public health, safety, and welfare. *Id.*; *see also id.* at 308 (Scalia, J., concurring in judgment, joined by Thomas, J.) (determining the ordinance to be general in its reach despite its reference to nude live entertainment). The operator's constitutional challenge, like Petitioners' argument here, was

"really an argument that the city council also had an illicit motive in enacting the ordinance." *Id.* at 292 (plurality opinion). Citing *O'Brien*, the Court reaffirmed that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.*

Rather than evaluating legislative purpose to determine whether a law is content based or content neutral, the "better formulation" is that a content-neutral law is "one that is 'justified without reference to the content of the regulated speech.'" Volokh, *supra*, at 1303 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001)). The Massachusetts Act is exactly such a law. It is justified because it protects safe access to reproductive health care. Accepting Petitioners' arguments would add considerable uncertainty and confusion to an area of well-settled law and open the door to subjective decisions by judges as to the standard of review to be applied in a given case.

C. The Act's Employee Exemption Is Not a Content-Based Regulation.

The commonsense, content-neutral exemptions provided for by the Act do not convert the regulation of conduct into the regulation of speech. The Act exempts (1) persons entering or leaving a facility; (2) clinic employees or agents acting within the scope of their employment; (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and (4) persons using the sidewalk or street right-of-way solely for the purpose of reaching a destination other than such facility. Mass. G.L. c. 266, § 120E1/2(b)(1)-(4).

Petitioners claim that exempting clinic employees and agents is a form of content-based discrim-

ination that violates their First Amendment rights. All the Act permits, however, is facility employees "acting within the scope of their employment" to freely use the egress in ingress area immediately outside their place of work. *Id.* § 120E1/2(b)(2). Recognizing that employees who work in a building have practical needs not shared by non-employees is not a form of invidious discrimination. It is why federal employees are not subject to restrictions on "public travel" on the Capital Grounds or the Supreme Court Grounds. *See* 40 U.S.C. § 5103; 40 U.S.C. § 6131. It is why an employee of the Selective Service System, but not a draftee, might lawfully destroy a draft card if acting within the scope of his or her employment. And it is why altar boys and girls are not cleared from the sidewalks in front of churches when serving a funeral mass in any of the 43 states that enforce funeral buffer zones. *See* Appendix B (listing statutes).[5] In all these cases, there is no First Amendment requirement that regulation of conduct be divorced from common sense.

II. The Constitutionality of the Act Does Not Depend on the Continued Viability of *Hill v. Colorado*.

Proof that *Hill v. Colorado* has generated significant debate in the academic community (a point made by Petitioners and their *amici*) is not a substitute for proving that the Massachusetts Act raises

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[5] *See also* Md. Code Ann., Crim. Law § 10-205 (funeral buffer zone law "does not apply to a person who conducts a funeral, burial, memorial service, or funeral procession"); N.M. Stat. Ann. § 30-20B-3 (unlawful to hinder access to funeral cite, "except that the . . . occupant of property may take lawful actions to exclude others from that property").

the same First Amendment concerns as the statute reviewed in *Hill*. *See, e.g.*, Amicus Brief of The National Hispanic Christian Leadership Conference, *et al.*; Amicus Brief of Eugene Volokh, *et al.*; Amicus Brief of Justice and Freedom Fund. A dispassionate assessment of the Act shows that it is significantly more protective of First Amendment interests than the statute reviewed in *Hill* and, moreover, reflects a legislative effort to address the concerns expressed by the *Hill* dissenters.

Hill considered a statutory ban on persons within 100 feet of the entrance to any health care facility "knowingly approach[ing]" within eight feet of another person without their consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...." Colo. Rev. Stat. § 18–9–122(3) (1999). The Massachusetts Act, in contrast, prohibits "knowingly enter[ing] or remain[ing]" within a radius of 35 feet of a reproductive facility, Mass. G.L. c. 266, § 120E½(b), while allowing *all* persons to traverse one side of the designated area for the purpose of reaching the other as they please. *See* Mass. G.L. c. 266, § 120E½(b)(4) (exempting "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility"). *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 757, 759-61 (1994) (affirming 36-foot buffer zone on a public street outside a health clinic).

Unlike *Hill*, "[n]o examination of the content of a speaker's message is required to determine whether an individual is [standing within a 35-foot radius of] a building." *Hill*, 530 U.S. at 766 (Kennedy, J., dissenting). The law equally applies to pro-life advocates, pro-choice advocates, opponents of birth con-

trol, and supporters of birth control. All receive the same treatment under the statute. So do those who wish to espouse any other political, religious, or commercial views, and those who wish to espouse no views on any subject whatsoever. Under these circumstances, the Act cannot fairly be described as "restrict[ing] speakers on one side of the debate: those who protest abortions," or as creating a zone where Supreme Court precedent "can be praised but not condemned." *Hill*, 530 U.S. at 768, 769 (Kennedy, J., dissenting). *See generally Madsen*, 512 U.S. at 762-63 ("There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.").

Petitioners mistakenly describe the Act as more burdensome than the *Hill* statute. They claim, for example, that *Hill* involved only an 8-foot zone while the Act applies to a 35-foot area. This argument ignores that the Colorado statute in fact created a *100-foot zone* from the entrance to any health care facility within which no person could come within eight feet of any other person entering or exiting the facility without their consent. *Hill*, 530 U.S. at 707 n.1. *See also id.* 530 U.S. at 755 (Scalia, J., dissenting) ("the State acknowledged at oral argument that the buffer zone would attach to any person within 100 feet of the entrance door of a skyscraper in which a single doctor occupied an office on the 18th floor").

Petitioners also complain that the Act creates "large painted zones" rather than invisible 8-foot floating bubbles. Petitioners' Br. 6-7. This provision of the Act, however, addresses a specific objection made to the statute at issue in *Hill*. Despite Petitioners' new-found nostalgia for *Hill*'s "floating buffer

zones," requiring protestors to run a 100-foot gauntlet at the risk of intentionally or accidentally penetrating imaginary 8-foot bubbles surrounding all persons moving in traffic around them hardly promotes free speech. As Justice Kennedy explained in critiquing the floating buffer zone in *Hill*:

> Assume persons are about to enter a building from different points and a protester is walking back and forth with a sign or attempting to hand out leaflets. If she stops to create the 8-foot zone for one pedestrian, she cannot reach other persons with her message; yet if she moves to maintain the 8-foot zone while trying to talk to one patron she may move knowingly closer to a patron attempting to enter the facility from a different direction.

530 U.S. at 773 (Kennedy, J., dissenting). From a First Amendment perspective, the Act is a significant improvement upon, and not an expansion of, the statute in *Hill*. *See generally Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 378-79 (1997) (noting constitutional problems with enforcing a floating buffer zone).

Petitioners also object that the Act does not have an exception for patients who consent to communications with them. That complaint also is born of a short memory. *See, e.g.*, Amicus Brief of Eugene Volokh, *et al.* at 8 ("many critics rebuked the Court for accepting a 'listener preclearance requirement'"). Statutes that condition speech on prior consent raise unique First Amendment concerns, another issue addressed by Justice Kennedy in *Hill*:

> [T]he statute requires a citizen to give affirmative consent before the exhibitor of a sign or the bearer of a leaflet can approach. When dealing with strangers walking fast toward a building's entrance, there is a middle ground of ambiguous answers and mixed signals in which misinterpretation can subject a good-faith speaker to criminal liability. The mere failure to give a reaction, for instance, is a failure to give consent. These elements of ambiguity compound the others.

530 U.S. at 773-74 (Kennedy, J., dissenting); *see also id.* at 758 (Scalia, J., dissenting) ("[f]ew pedestrians are likely to give their 'consent' to the approach of a handbiller").

Finally, Petitioners argue that because the Act only applies to reproductive health care clinics during business hours, it *must* be intended to suppress the speech most likely to occur outside those facilities—speech about abortion. Content-neutral regulations of conduct, however, historically have not been considered unconstitutional simply because they are narrowly focused on solving a specific public safety problem before the legislature. Nor is it unusual for conduct regulations to affect some would-be speakers more than others. *See generally O'Brien*, 391 U.S. 367. The same is true of time, place and manner restrictions. One of the dangers posed by Petitioners' argument is that lower courts would be authorized to carve out exceptions to both types of regulation based on their assessment of the importance or probity of the message a particular group wishes to convey.

One would not have thought, for example, that the lesson of *Police Department of Chicago v. Mosley*

was that a blanket ban on picketing outside schools would be unconstitutional because it would deprive unionized teachers of the most effective location to protest the terms and conditions of their employment. 408 U.S. 92, 99-100 (1976). Nor would one expect that a legislative record demonstrating a public safety need to protect young children walking into grammar schools would require the legislature to impose identical speech regulations at high schools where there were no comparable threats to student safety and well-being. The Massachusetts Act similarly was enacted to respond to a particular problem, namely violence and obstruction outside reproductive health clinics, a proven threat to public safety.

In short, accusing the Massachusetts legislature of expanding *Hill* ignores the language and effect of the Act. The Act is content and viewpoint neutral, applying not just to those who oppose or support abortion rights, but to all persons who traverse the 35-foot radius of the entrance to a reproductive health care facility. *See generally Madsen*, 512 U.S. at 764-65 (ordinances "represent a legislative choice regarding the promotion of particular societal interests" and therefore carry fewer risks of censorship and discriminatory application than do injunctions) (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.")).

III. The Act Is a Constitutional Means of Accommodating a Competing Constitutional Right Unrelated to Suppressing Speech.

Petitioners' fervent desire to advocate their religious and political beliefs at the entrances to repro-

ductive health care facilities raises important First Amendment issues, but does not by itself dictate the outcome of this case. *See Colloquium*, Professor Michael W. McConnell's Response, 28 PEPP. L. REV. 747, 747 (2001) (noting the "very serious trouble" that arises when "the Court lines up on free-speech cases according to whether they agree with the speakers or not") (quoted in Amicus Brief of Eugene Volokh, *et al.* at 7). Abortion is not the only divisive issue about which people have abiding moral, religious, or political convictions. Excusing particular groups from generally applicable and facially neutral conduct regulations based on the courts' assessment of the value of the message they seek to convey would introduce a dangerous form of reverse-discrimination analysis into settled First Amendment jurisprudence.

There is no doubt, for example, that the First Amendment does not tolerate an election-day ban on speakers "urging people to vote a certain way." *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966). Such a law violates fundamental First Amendment principles by requiring speakers to remain silent "at a time when [speech] can be most effective." *Id.*

The same speakers understandably might wish, while standing on public property, to attempt to persuade voters as they approach a polling place. Polling place advocacy is speech about "candidates, structures and forms of government, [and] the manner in which government is operated or should be operated," *i.e.*, "political speech ... that is central to the meaning and purpose of the First Amendment." *Id.* at 218-19; *Citizen's United v. Federal Elections Commission*, __ U.S. __, 130 S. Ct. 876, 892 (2010). "As anyone who has engaged in political leafletting can attest, there are few better places to reach and influence voters than the area surrounding a polling site.

Everyone a campaign worker communicates with at that place and time is intending to vote and is thinking about the very issues the speaker is trying to address." Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1213 (1996).

All of this is true, yet no matter how pure and peace-loving the beliefs and intentions of an election-day speaker, the state is free to enforce a 100-foot "campaign-free zone" around polling places to prevent voter intimidation and fraud. *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality). In *Burson* (further discussed *infra*), the Court upheld the constitutionality of such a buffer-zone law that, unlike this case, expressly targeted political speech. The statute, though content-based, survived strict scrutiny largely because the government "has such a compelling interest in securing the right to vote freely and effectively." *Id.* at 208-209.

The *Burson* plurality explained its ruling in plain speaking, practical terms: "'[I]t takes approximately 15 seconds to walk 75 feet.' Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." *Id.* at 210. In the context of a polling place buffer zone, that principle could be applied "without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote." 504 U.S. at 213-14.

Burson is not a First Amendment anomaly. For example, the Court long ago rejected the idea

that the goal of "preserv[ing] judicial impartiality" allows the state to "close all channels of public expression to all matters which touch upon pending cases." *Bridges v. California*, 314 U.S. 252, 271 (1941). Accordingly, even though judges are duty-bound to decide cases solely on the evidence and the law, the First Amendment protects the right of the people to urge judges to rule for or against one side or another in a pending case. *Id.* at 272-78.

Not so, however, when the speaker is standing near a courthouse. In that setting, "the legislature has the right to recognize the danger that some judges, jurors, and other court officials will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). "[R]egardless of whether the motives of the [courthouse] demonstrators are good or bad," all that is required is a "legislative determination based on experience that such conduct inherently threatens the judicial process." *Id.* at 566.

The right to "organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine" similarly has "deep roots in our legal tradition." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, __ U.S. __, 132 S. Ct. 694, 713 (2012) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1872). Religious advocacy is protected whether the speech is "'vehement, caustic, and sometimes unpleasan[t].'" *Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1216-17, 1219 (2011) (citation omitted), or empathetic and loving, *Hill v. Colorado*, 530 U.S. 703, 757 (2000) (Scalia, J., dissenting).

The legislatures of 43 states and the United States Congress nevertheless have enacted laws restricting speech activities around funerals and burial

grounds.[6] *See* Appendix B (listing statutes). The sheer number of these statutes attests to the fact that funeral sites are considered effective locations for religious advocacy. Yet none of these laws are unconstitutional simply because they restrict speech in precisely the location where people wish to express their sincerely held beliefs. Nor could one reasonably argue that allowing funeral home employees, but not protestors, to freely traverse within the protected zones makes the laws content- or viewpoint-based speech regulations.[7] Rather, such laws are constitutional when they are content and viewpoint neutral, and are supported by a sufficient factual record demonstrating that they are needed to protect another constitutional right, as is the Massachusetts Act. *See generally Mosley*, 408 U.S. 98 ("This is not to say that all picketing must always be allowed. We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests"); *Madsen*, 512 U.S. at 772-73 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

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[6] Michigan and the other 11 States that filed an amicus brief in support of Petitioners all have statutory funeral buffer zones. *See* Appendix B (listing state and federal statutes).

[7] *See* n.5, *supra*.

IV. The Act Is Narrowly Tailored to Safeguard the Exercise of a Competing Constitutional Right.

There is "narrow area" in which the First Amendment "permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, 504 U.S. at 213 (Kennedy, J., concurring). Although neither Petitioners nor 16 of their 18 *amici* cited *Burson* in their briefs, the case upheld a content-based buffer zone prohibiting political speech in "quintessential public forums." 504 U.S. at 196-97.[8] *Burson* compels the

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[8] *See* Amicus Brief of Center for Constitutional Jurisprudence ("CCJ Br.") at 15-16; Amicus Brief of Michigan and 11 Other States ("Mich. Br.") at 3-5. Both briefs failed to distinguish *Burson*. Michigan argued that the polling place buffer zone in *Burson* imposed only a "minor geographic limitation" on First Amendment rights—*i.e.*, 100 feet, almost three times larger than the 35-foot zone established by the Act. Mich. Br. at 4. Both briefs praised polling place buffer zones for applying only on election days, *id.*; CCJ Br. at 16—ignoring that those "citizens who claim First Amendment protection [at polling places] seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting). The CCJ lauded polling place buffer zones for "only prohibit[ing] active campaigning"—a paradigm example of a content-based speech regulation. CCJ Br. at 15. And both relied on evidence from the Nineteenth Century as supporting the need for polling place buffer zones—a need supplanted by the country's embrace of the secret ballot one hundred years earlier. *Id.* at 15-16; Mich. Br. at 4-5. *See generally Doe v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 2836 (2010) (Scalia, J., concurring).

conclusion that the Massachusetts Act survives strict scrutiny.

The statute in *Burson* banned within 100 feet of polling places "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position." *Id.* at 193-94. The *Burson* plurality nevertheless held that the state's interest in "protecting the right of its citizens to vote freely for the candidates of their choice," and preventing voter intimidation and fraud were "compelling" state interests. *Id.* at 198-99, 206.[9] These interests justified imposing, in effect, a gag order on speech uttered during a campaign for political office, speech to which the First Amendment "has its fullest and most urgent application." *Id.* at 196 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

In *Burson*, as here, opponents argued that the law was not sufficiently narrowly tailored because the state simply could have outlawed intimidation and violence outside of polling places. The statute, after all, prohibited the "act of (shudder!) [soliciting votes] within [100 feet]" of a polling place, even if the voters are a "300–pound, male, and unpregnant truck drivers[.]" *Hill*, 530 U.S. at 762 n.5 (Scalia, J., dissenting). The Court was "not persuaded," reasoning that absent a polling place buffer zone, "many acts of interference would go undetected," and that "[v]oter

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[9] Justice Scalia concurred in the judgment, concluding that the buffer zone did not restrict speech in a traditional public forum and that the "exacting scrutiny" applied by the plurality therefore did not apply. 504 U.S. at 214 (Scalia, J., concurring in the judgment).

intimidation and election fraud are successful precisely because they are difficult to detect." *Burson*, 504 U.S. at 206-207, 208.

Burson also rejected the argument that a buffer zone must be supported by evidence of recent instances of intimidation or abuse (the election abuses cited by the Court occurred in the 19th Century before the widespread adoption of the secret ballot, *id.* at 200-205), or by empirical evidence that the zone effectively achieved the statute's intended purpose. *Id.* at 208-209.

> Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."

Id. at 209 (citation omitted).

Making specific findings about the effect of a no-speech zone within 35 feet of a healthcare facility is no less difficult than the task faced in *Burson*, and the remedy for infringing upon a woman's exercise of her constitutional right to reproductive freedom is similarly "imperfect." As Justice Blackmun stated in an analogous context: "Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where pa-

tients and relatives alike often are under emotional strain and worry ... [and] need a restful, uncluttered, relaxing and helpful atmosphere." *Madsen*, 512 U.S. at 772 (quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring).

This case presents a detailed record developed by the legislature establishing the factual basis for and non-discriminatory purpose of the Act. Accordingly, even if the Act's regulation of conduct were treated as a *Burson*-type content regulation, the Commonwealth "has asserted that the exercise of free speech rights conflicts with another fundamental right, the right [to reproductive choice] free from the taint of intimidation and fraud." 504 U.S. at 211. Viewed under the *Burson* lens, the issue is whether Massachusetts made an "unconstitutional choice" when it decided, based on extensive legislative findings, that the last seven seconds it takes a woman to walk into a medical facility to exercise a constitutional right "should be [her] own, as free from interference as possible." 504 U.S. at 210. "Given the conflict between these two rights, [the Court should] hold that requiring solicitors to stand [35] feet from the entrances to [clinics] does not constitute an unconstitutional compromise." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

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APPENDIX B

LIST OF FUNERAL BUFFER-ZONE STATUTES

38 U.S.C. §§ 2413(a) (regulating demonstrations at cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery or within 300 feet of a road, pathway, or other route of ingress to or egress from such cemetery)

Ala. Code § 13A-II-17 (unlawful to "[e]ngag[e] in a protest, including, but not limited to, protest with or without using an electric sound amplification device, that involves singing, chanting, whistling, yelling, or honking a motor vehicle horn within 1,000 feet of the entrance to a facility being used for a funeral or memorial service")

Ark. Code Ann. § 5-71-230 (unlawful within 300 feet of a funeral to knowingly picket for the purpose of interfering with the funeral)

Cal. Penal Code § 594.35(d) (unlawful to "[d]istur[b], obstruct[t], ... or interfer[e] with any person carrying or accompanying human remains to a cemetery or funeral establishment, or engaged in a funeral service, or an interment")

Colo. Rev. Stat. §§ 13-21-126 ("unlawful for a person to knowingly engage in funeral picketing within one hundred feet of the funeral site")

Conn. Gen. Stat. § 53a-183c (unlawful to within one hundred fifty feet of route of ingress to or egress from the location of a funeral "wilfully mak[e] or assis[t] in the making of any noise or diversion that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral with the intent [to do so]"; or within three hundred feet of the boundary of the location of such funeral "wilfully and without proper authorization

imped[e] the ingress to or egress from such location" with the intent to do so)

Del. Code Ann. Ti. II, §1303 (unlawful to "[d]isturb or disrupt [a] funeral, memorial service, funeral procession, or burial" within 300 feet of building in which it is held)

Fla. Stat. § 721.02 ("A person may not knowingly engage in protest activities or knowingly cause protest activities to occur within 500 feet of the property line of a residence, cemetery, funeral home, house of worship, or other location during or within 1 hour before or 1 hour after the conducting of a funeral or burial at that place")

Ga. Code Ann. § 16-11-34.2 ("It shall be unlawful to engage in any disorderly or disruptive conduct with the intent to impede, disrupt, disturb, or interfere with the orderly conduct of any funeral or memorial service")

Idaho Code Ann. § 18-6409 ("Every person who maliciously and willfully disturbs the dignity or reverential nature of any funeral, memorial service, funeral procession, burial ceremony or viewing of a deceased person is guilty of a misdemeanor")

Ill. Comp. Stat. 5/26-6(c)(1) (prohibiting "loud singing, playing of music, chanting, whistling, yelling, or noisemaking with, or without, noise amplification including, but not limited to, bullhorns, auto horns, and microphones within 300 feet of any ingress or egress of [a] funeral site")

Ind. Code §§ 35-45-1-3 (unlawful to disrupt a lawful assembly of persons within 500 feet of a funeral)

Iowa Code Ann. § 723.5 (unlawful to disturb or disrupt a funeral within five hundred feet of the building in which it is held)

Ky. Rev. Stat. Ann. §§ 525.155 (person who "blocks, impedes, inhibits, or in any other manner ob-

structs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted" is guilty of "interference with a funeral")

La. Rev. Stat. Ann. § 14:103 (disturbing the peace includes "[i]ntentionally engaging in any act or any utterance, gesture, or display designed to disrupt a funeral, funeral route, or burial of a deceased person during the period beginning one hundred twenty minutes before and ending one hundred twenty minutes after the funeral or burial, within three hundred feet of the funeral or burial" or "[i]ntentionally blocking, impeding, inhibiting, or in any other manner obstructing or interfering, within five hundred feet, with access into or from any building or parking lot of a building in which a funeral or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral or burial is being conducted, during the period beginning one hundred twenty minutes before and ending one hundred twenty minutes after the funeral or burial")

Me. Stat. 17-A § 501-A (disorderly conduct occurs when, "[i]n a private or public place on or near property where a funeral, burial or memorial service is being held, the person knowingly accosts, insults, taunts or challenges any person in mourning and in attendance at the funeral, burial or memorial service with unwanted, obtrusive communications by way of offensive, derisive or annoying words, or by gestures or other physical conduct, that would in fact have a direct tendency to cause a violent response by an ordinary person in mourning and in attendance at a funeral, burial or memorial service")

M.G.L.A. 272 § 42A ("Whoever pickets, loiters or otherwise creates a disturbance within five hundred feet of a funeral home, church or temple or other building where funeral services are being held, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year in a house of correction, or both.")

Md. Code Ann., Crim. Law § 10-205(c) ("A person may not engage in picketing activity within 500 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession")

Mich. Camp. Laws §§ 123.1111 ("A local unit of government may pass such ordinances as it considers necessary to protect and preserve the peace and respect toward those attending or conducting a funeral or memorial service")

Minn. Stat. § 609.501 (unlawful to "with intent to disrupt a funeral ceremony, graveside service, or memorial service, protes[t] or picke[t] within 500 feet of the burial site or the entrance to a facility or location being used for the service or ceremony, within one hour prior to, during, or one hour following the service or ceremony")

Miss. Code Ann. § 97-35-18 (unlawful to "[w]ith intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protes[t] or picke[t] within 1,000 feet of the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony")

Mo. Rev. Stat. §§ 578.501 ("It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the com-

mencement of any funeral, and until one hour following the cessation of any funeral.")

Mont. Code Ann. § 45-8-116 ("A person commits the offense of funeral picketing if the person knowingly engages in picketing within 1,500 feet of any property boundary entrance to or exit from a funeral site during the period from 1 hour before the scheduled commencement of the funeral services until 1 hour after the actual completion of the funeral services.")

Neb. Rev. Stat. § 28-1320.03 (" A person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.")

N.H. Rev. Stat. § 644:2-b ("unlawful for any person to engage in picketing or other protest activities at any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral, if such picketing or other protest activities ... (a) Take place within 150 feet of a road, pathway, or other route of ingress to or egress from cemetery property and include, as part of such activities, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or (b) Are within 300 feet of such cemetery and impede the access to or egress from such cemetery.")

N.J. Stat. Ann. § 2C:33-8.1 (person who "engages in demonstration activities within 500 feet of the funeral, the funeral procession, the funeral home, church, synagogue, temple or other place of public worship or other location at which a funeral takes place and makes or assists in the making of noise, diversions, or threatening gestures, or engages in any

other disruptive conduct, that disrupts or tends to disrupt the peace or good order of the funeral" is guilty of disrupting a funeral)

N.M. Stat. Ann. § 30-20B-3 (unlawful to "engage in any loud singing, playing of music, chanting, whistling, yelling or noisemaking with or without noise amplification, including bullhorns, auto horns and microphones within five hundred feet of any ingress or egress of that funeral site, when the volume of such singing, music, chanting, whistling, yelling or noisemaking is audible at and disturbing to the peace and good order of a funeral at that funeral site" or "knowingly obstruct, hinder, impede or block another person's access to or egress from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property")

N.Y. Penal Law § 240.21 ("A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within three hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof")

N.C. Gen. Stat. Ann. § 14-288.4 (outlawing "singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral" or "[a]ttempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial")

N.D. Cent. Code § 12.1-31-01.1 (disorderly conduct if a person "[e]ngages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling, or noisemaking within one thousand feet [300.48 meters] of any in-

gress or egress of that funeral site if the volume of the singing, music, chanting, whistling, yelling, or noisemaking is likely to be audible at and disturbing to the funeral site")

Ohio Rev. Code Ann. § 3767.30 ("No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any funeral procession.")

Okla. Stat. T. 21, § 1380 ("It is unlawful for any person to engage in picketing within one thousand (1,000) feet of the property line of any cemetery, church, mortuary or other place where any portion of a funeral service is held during the period from two (2) hours before the scheduled commencement of funeral services until two (2) hours after the actual completion of the funeral services")

Pa. Cons. Stat. Ann. § 7517 ("A person commits a misdemeanor of the third degree if the person engages in demonstration activities within 500 feet of any cemetery, mortuary, church or other location being utilized for the purposes of a commemorative service within one hour prior to, during and one hour following the commemorative service.")

R.I. Gen. Laws § 11-11-1 (unlawful to "willfully interrupt or disturb any ... assembly of people met for religious worship, any military funeral or memorial service")

S.C. Code Ann. § 16-17-525 ("unlawful for a person to wilfully, knowingly, or maliciously disturb or interrupt a funeral service" if within one thousand feet of the funeral service")

S.D. Codified Laws §§ 22-13-17 ("No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services un-

til one hour after the actual completion of the funeral services.")

Tenn. Code Ann. § 39-17-317 (person "making any utterance, gesture, or display in a manner offensive to the sensibilities of an ordinary person" if "within five hundred feet ... of a funeral" commits the offense of interfering with a funeral)

Tex. Penal Code Ann. §§ 42.055 ("A person commits an offense if, during the period beginning three hours before the service begins and ending three hours after the service is completed, the person engages in picketing within 1,000 feet of a facility or cemetery being used for a funeral service")

Utah Code Ann. § 76-9-108 (outlawing "the distribution of any handbill, pamphlet, leaflet, or other written material or other item that is not part of the memorial service")

Va. Code Ann. § 18.2-415 (unlawful to "[w]illfully ... disrup[t] any funeral ... if the disruption (i) prevents or interferes with the orderly conduct of the funeral")

Vt. Stat. Ann. Ti. 13, § 3771 ("No person shall disturb or attempt to disturb a funeral service by engaging in picketing within 100 feet of the service within one hour prior to and two hours following the publicly announced time of the commencement of the service")

Wash. Rev. Code Ann. §9A.84.030 (unlawful to make "unreasonable noise" within five hundred feet of a funeral or burial)

Wis. Stat. §947.01 and §947.011 (outlawing "boisterous, unreasonably loud or otherwise disorderly conduct" within 500 feet of any entrance to a facility being used for a funeral service with the intent to disrupt the service)

Wyo. Stat. Ann. § 6-6-105 ("A person commits a misdemeanor punishable by imprisonment for not

more than six (6) months, a fine of not more than seven hundred fifty dollars ($750.00), or both, if he protests, pickets, or otherwise causes a breach of the peace within nine hundred (900) feet of a cemetery, church, building or other facility at which a funeral or memorial service is being conducted, and if the protest, picket or other action occurs within one (1) hour prior to, during or within one (1) hour after the funeral or memorial service and the protest, picket, or breach of the peace is directed at the funeral or memorial service")

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

FILED
SEP 16 2013
OFFICE OF THE CLERK

No. 12-1168

IN THE SUPREME COURT OF THE UNITED STATES

ELEANOR MCCULLEN, ET. AL.,
Petitioners

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious expression in the public square, as well as the family and sanctity of life, across the United States.

Liberty Counsel's Founder and Chairman, Mat Staver, was lead counsel for the pro-life demonstrator Petitioners in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), one of the precedents upon which the First Circuit relied in upholding the statute at issue in this case. Through its participation in *Madsen* and representation of pro-life demonstrators in other cases since 1989, Liberty Counsel has developed a substantial body of information related to the detrimental consequences of limiting First Amendment

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have consented to the filing of this Brief. The consents are being filed simultaneously with this Brief.

protection for pro-life demonstrators at abortion clinics.

Regulations such as the statute at issue in this case pose a significant threat to bedrock First Amendment freedoms as they chill the very kind of controversial speech the Founders sought to protect when they enacted the First Amendment. It is critically important that citizens' free speech rights not be sacrificed in order to protect others from having to encounter offensive or controversial speech. If regulations such as the statute at issue here are permitted to stand, then it will cause a ripple effect that will undermine the foundational freedoms upon which this country was founded.

Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

SUMMARY OF ARGUMENT

A troubling trend has made its way into this Court's First Amendment jurisprudence, and this case represents the latest, most extensive and potentially most damaging example of that trend which has been called the abortion "ad-hoc nullification machine." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814-15 (1986) (O'Connor, J. dissenting), *overruled by Planned*

Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). For nearly 40 years, this machine has eaten away at bedrock constitutional principles when those principles are seen as threatening a woman's "right to choose" abortion announced in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

Since *Roe*, this Court has strengthened the "right to choose" abortion at the expense of longstanding protections of fundamental rights. *Thornburgh*, 476 U.S. at 814 (O'Connor, J. dissenting). "The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it." *Id.* The abortion exception to evenhanded application of long-standing legal doctrines has even engulfed fundamental First Amendment principles, including content and viewpoint neutrality and freedom from prior restraint. *See Madsen*, 512 U.S. at 785 (Scalia, J. concurring in part and dissenting in part)("Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment."). As Justice Scalia said in *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J. dissenting):

> What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.

Laws that in other contexts would be struck down as unconstitutional prior restraints or content and viewpoint-based discrimination are upheld in the abortion context, ostensibly in favor of protecting health and safety or the sensibilities of those who might hear messages that would discourage them from seeking an abortion. *See Madsen*, 512 U.S. at 785.

Relying upon *Madsen* and *Hill*, the First Circuit has taken ad hoc nullification to a new level, restricting not merely non-consensual conversations, but even entry by all except abortion supporters and state employees into a 35 foot "buffer zone" encompassing public streets and sidewalks around abortion clinics.[2] *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013). The First Circuit's decision not only nullifies long-standing prohibitions against prior restraints and content-based restrictions, but

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[2] Mass. Gen. Laws ch. 266 §120E½

also expands the concept of a "captive audience" –intended to protect people in the privacy of their homes–to women walking on public streets and sidewalks, so long as they are on their way to an abortion clinic to procure an abortion. *Id.*

If permitted to stand, the First Circuit's iteration of the "ad hoc nullification machine" will render the First Amendment virtually meaningless in the abortion context. This case illustrates how damaging the Court's special treatment of speech restrictions affecting abortion has become to the First Amendment itself and the need for the Court to dismantle the "ad hoc nullification machine" before it can do further damage.

LEGAL ARGUMENT

I. THE ABORTION AD HOC NULLIFICATION MACHINE HAS LEGITIMIZED PRIOR RESTRAINTS THAT THIS COURT HAS OTHERWISE FOUND TO BE THE ESSENCE OF CENSORSHIP.

For the 150-plus years prior to finding a constitutional "right to choose" abortion in *Roe* and *Doe*, this Court recognized that the primacy of the free speech protections in the First Amendment required vigorous protection against prior restraints. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). However, with the

advent of the constitutional "right to choose" has come diminished concern for restricting free speech rights when they might affect a woman's decision to have an abortion. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785 (1994) (Scalia J., dissenting).

A. Outside Of The Abortion Context Listeners Must Tolerate Uncomfortable, Even Offensive Speech As Prior Restraints Are Almost Always Struck Down As Patently Unconstitutional.

As this Court has long recognized, placement of freedom of speech in the First Amendment was no accident, but was reflective of the Founders' conviction that free speech is the foundation of liberty. *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J. concurring).

> They [the Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords

ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech

> and assembly should be guaranteed.

Id. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

This Court has zealously protected those principles by consistently rejecting attempts to censor unpopular viewpoints, finding that in the course of public debate, people "must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." *Boos v. Berry*, 485 U.S. 312, 322 (1988).

> (A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often

> provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

Adhering to the principle that debate on public issues should be "uninhibited, robust and wide-open," this Court has been particularly critical of attempts to censor speech that is unpopular, controversial or offensive. *N.Y. Times v. Sullivan*, 376 U.S. at 270. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In fact, this Court has called the prevention of prior restraints the chief purpose of the First Amendment's free speech guaranty. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 (1976) (Brennan, J. concurring). "Prior restraints are 'the essence of censorship,' and '(o)ur distaste for censorship reflecting the natural distaste of a free people is deep-written in our law.'" *Id.* at 588-589 (citing *Near v. Minnesota,* 283 U.S. 697, 713, 716-17 (1931), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, (1975)).

> [A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Id. at 589 (citing *Southeastern Promotions,* 420 U.S. at 559).

This Court has recognized only three narrow exceptions to the prohibition against prior restraints, and even those exceptions are cabined by procedural prerequisites to ensure against unduly restricting free speech. *Id.* at

590. Two of the three exceptions encompass speech that is now regarded as outside of the protection of the First Amendment—speech that is obscene or that incites violence or the overthrow of the government. *Id.* Therefore, the only recognized exception to prior restraints upon constitutionally protected speech is for speech that poses a threat to national security. *Id.* Even then, the Court has construed the exception extremely narrowly to include only circumstances when the speech will "surely result in direct, immediate, and irreparable damage to our Nation or its people," or when there is proof that the information will inevitably, directly and immediately imperil the safety of military personnel. *Id.* at 593 (citing *New York Times v. United States*, 403 U.S. 713, 730-731 (1971)).

Consequently, even in the case of the Pentagon Papers, which the Court acknowledged were "Top Secret-Sensitive," obtained surreptitiously, would be harmful to the nation if disclosed and might be prosecuted after publication as a violation of various espionage statutes, this Court would not countenance a prior restraint. *Id.* (citing *New York Times*, 403 U.S. at 730-731). "It is thus clear that even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials, the obstacles to issuance of such an injunction are formidable." *Id.* at 594.

Based upon that principle, this Court declined to adopt "the creation of a new, potentially pervasive exception to this settled rule of virtually blanket prohibition of prior restraints" urged by the respondents in *Nebraska Press Association*. *Id.*

This Court has continued to adhere to these "bedrock" principles, even in cases involving such offensive conduct as desecrating the flag, *Texas v. Johnson*, 491 U.S. at 414, cross-burning, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) and picketing with signs such as "God hates fags" outside of military funerals, *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011). "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole–such as the principle that discrimination on the basis of race is odious and destructive–will go unquestioned in the market-place of ideas." *Johnson*, 491 at 418. "We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment." *Id.*

B. When A Statute Affects Abortion Clinics, The Need For Breathing Space Disappears And Prior Restraints Become Acceptable.

While the flag is not entitled to an

exception to the "joust of principles protected by the First Amendment," apparently abortion is, as this Court has seemingly set aside the "virtual blanket prohibition against prior restraints" to protect a woman's "right to choose." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Action Network*, 519 U.S. 357 (1997); *Hill v. Colorado*, 530 U.S. 703 (2000); *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013). One of the earliest cases to carve out a special exception for abortion was *Thornburgh v. ACOG*, 476 U.S. 747 (1986). *Thornburgh* was later overruled in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), when this Court upheld later iterations of informed consent laws. Nevertheless, it is instructive in illustrating the advent and extent of the abortion "ad hoc nullification machine."

Thornburgh

In fact, it is in her dissent in *Thornburgh* that Justice O'Connor used the term "ad hoc nullification" to describe the differential treatment being accorded to abortion regulations. *Thornburgh*, 476 U.S. at 814-815 (O'Connor, J. dissenting). In *Thornburgh*, the Court struck down statutes that proscribed medical and social service information to be included as part of the informed consent

provided to women seeking abortions. *Id.* at 763-764. Despite the absence of language expressing any viewpoint on the advisability of abortion, the Court found that the statutes were disguised anti-abortion rhetoric and facially unconstitutional. *Id.* The *Thornburgh* Court thus elevated the woman's "right to choose" and effectively imposed a prior restraint on any speech that offered information on procedures and alternatives to abortion.

This prompted Justice O'Connor to state:

> This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. *See Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452, 103 S.Ct. 2481, 2504, 76 L.Ed.2d 687 (1983) (O'CONNOR, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.

Id. at 814.

As Justice White said in his dissent, "One

searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the subject is abortion." *Id.* at 800. Chief Justice Burger described the extent of the Court's expansion of the abortion right at the expense of free speech:

> [T]oday the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Id. at 783 (Burger, C.J., dissenting). Chief

Justice Burger recognized that the informed consent statutes at issue in *Thornburgh* were "in accord with our history and tradition," and that finding them unconstitutional set the stage for further erosion of long-standing constitutional principles. *Id.* at 785.

Madsen

Further erosion did indeed occur in *Madsen*, where the Court upheld a speech restrictive injunction that in any other context would have been invalidated as an unconstitutional prior restraint. *Madsen*, 512 U.S. at 785 (Scalia J., dissenting). The injunction upheld in *Madsen* established a thirty-six-foot buffer zone on a public street outside of an abortion clinic. *Id.* at 757-758. The injunction prohibited pro-life speakers from communicating their message, *even on a public street*, if it was within 36 feet of the abortion clinic. *Id.* at 759-760. While recognizing that the buffer zone restricted the free speech activities of only pro-life speakers, the Court nevertheless rejected the petitioners' prior restraint challenge. *Id.* at 763 n.2.

In fact, the Court relegated its analysis of prior restraint, which it had previously called the chief purpose of the First Amendment's free speech guaranty, *Nebraska Press Ass'n*, 487 U.S. at 588, to a footnote. *Madsen*, 512 U.S. at 763 n.2. "Not all injunctions that may

incidentally affect expression, however, are 'prior restraints...'" *Id.* "Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36–foot buffer zone." *Id.* Finally, the Court claimed that there was no prior restraint because the restriction was not based upon the content of the speech but on prior "unlawful conduct." *Id.* However, as Justice Scalia pointed out, there was no evidence that the petitioners had broken any law. *Id.* at 785 (Scalia, J., dissenting).

In dissent, Justice Scalia emphasized the inconsistency of the Court's decision with long-standing First Amendment precedent. *Id.* "Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment." *Id.* The judicial creation of a 36–foot zone "in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions." *Id.* In any other context, the injunction would have "been a candidate for summary reversal." *Id.*

Lawson v. Murray

The First Amendment was eroded even further in *Lawson v. Murray,* in which the Court let stand a state court injunction against peaceful picketing on sidewalks in front of an abortion doctor's residence. *Lawson v. Murray,* 515 U.S. 1110 (1995). Although concurring in the denial of certiorari, Justice Scalia explained how that injunction represented a further inroad by the "right to choose" into the bedrock of First Amendment protection. *Id.*

> Last Term's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), has damaged the First Amendment more quickly and more severely than I feared. In this case the New Jersey courts asserted the power to enjoin residential picketing by antiabortion demonstrators that was explicitly found to have been peaceful and in violation of no state statute or rule of common law. It is one thing for the courts to enforce by injunction a general, content-neutral state law (civil or criminal) against all residential picketing, or to enjoin particular individuals from continuing residential

> picketing that they have conducted in an unlawful manner.... It is quite another thing for the courts to enjoin particular individuals from conducting lawful residential picketing that they have conducted in a lawful manner in the past. **That is an unconstitutional prior restraint.**

Id. at 1110-1111 (emphasis added). Nevertheless, since the injunction affected the "right to choose", the Court let the injunction stand.

Schenck

In *Schenck,* the Court also relegated to a footnote its rejection of petitioners' claim that fixed 15-foot buffer zones around entrances to abortion clinics amounted to unconstitutional prior restraints. 519 U.S. at 74 n.6. Quoting directly from *Madsen*, the Court said, "alternative channels of communication were left open to the protesters, and 'the injunction was issued not because of the content of [the protesters'] expression,...but because of their prior unlawful conduct.'" *Id.*

Of course, "alternative channels of communication were left open" to the flag burners in *Texas v. Johnson* and the cross-burners in *R.A.V. v. City of St. Paul*, too, but

that made no difference to the Court in those cases. In other words, an injunction prohibiting speech within 15 feet of a commercial establishment, including on public streets and sidewalks, constitutes a prior restraint on speech in any context **unless the establishment is an abortion clinic and the speech is a pro-life message**. *Id.*

Hill

In *Hill*, the Court added fuel to the "ad hoc nullification machine" by sanctioning statutory as well as injunctive prohibitions against pro-life speech. 530 U.S. at 733-735. Instead of merely restricting the speech activities of a discrete set of plaintiffs, the regulation at issue in *Hill* was a statute which was generally applicable to all residents of Colorado. *Id.*

The statute made it illegal, within 100 feet of the entrance to a health care facility, to "'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id.* at 707. Despite its broad applicability and restriction against even passive communication, the Court found that the Colorado statute raised "an even lesser prior restraint concern" than did the

injunctions in *Madsen* and *Schenck*. *Id.* at 733. The Court justified its conclusion in part by asserting that the statute did not represent "official censorship." *Id.* at 734. Instead, the statute "simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear." *Id.*

However, as Justices Kennedy and Scalia pointed out in their dissents, the statute strikes at the very heart of the First Amendment prohibition against prior restraints. *Id.* at 789 (Kennedy, J. dissenting); *id.* at 763 (Scalia, J. dissenting). "What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse." *Id.* at 789. The 100-foot zone outside the abortion clinic, the subject of the statute, is likely the only place where pro-life speakers can present their message effectively to women. *Id.* "It is the location where the Court should expend its utmost effort to **vindicate** free speech, not to **burden** or suppress it." *Id.* (emphasis added).

Justice Scalia agreed that, in light of the Court's decisions expanding protection of the "right to choose," the only option available for those who want to communicate a pro-life message to those seeking abortion is via one-on-one conversation. *Id.* at 763. The most effective place for that type of speech is outside

the entrances to abortion facilities, the very venue restricted by the Colorado statute. *Id.*

Standing in stark contrast to the bedrock principles underlying the First Amendment, the Court's decision upholding the speech restriction "expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong." *Id.* at 742 (Scalia, J., dissenting). Once again, the "ad hoc nullification machine" was used by the Court "to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice" of abortion. *Id.* at 741.

McCullen

Emboldened by the growing power of the "ad hoc nullification machine," the Massachusetts legislature now seeks to destroy whatever vestiges remain of the prohibition against prior restraints in the abortion context. Going beyond Colorado's prohibition of "approaching" someone without their consent, the Massachusetts law forbids anyone from even entering within a 35 foot "buffer zone" around abortion clinics unless the person entering is a patient, clinic worker or state employee.[3]

Consequently, those who provide abortion services and therefore espouse a favorable

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[3] Mass. Gen. Laws ch. 266 §120E½

message about abortion are free to enter within 35 feet of an abortion clinic and communicate with patients.[4] However, if someone wants to speak to a clinic patient or worker about the meaning and consequences of abortion or alternatives to abortion, then that person is prohibited from even entering the zone. Any hope of "uninhibited, robust and wide-open" discussion of abortion, *N.Y. Times v. Sullivan*, 376 U.S. at 270, will be completely extinguished under the Massachusetts statute.

This Court can only halt this further assault on the First Amendment and begin the process of dismantling the "ad hoc nullification machine" by overturning the Massachusetts law.

II. THE ABORTION AD HOC NULLIFICATION MACHINE DISCARDS CONTENT AND VIEWPOINT NEUTRALITY IN FAVOR OF GOVERNMENT CONTROL OVER THE CONTENT OF MESSAGES.

Another bedrock tenet of First Amendment jurisprudence threatened by the abortion "ad hoc nullification machine" is the principle that the government must remain neutral in the marketplace of ideas. *R.A.V. v.*

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[4] *Id.*

City of St. Paul, 505 U.S. 377, 387 (1992). Outside of the abortion context, this Court consistently rejects content and viewpoint-based restrictions on speech unless they can satisfy the most exacting scrutiny. *Id.* However, when an abortion clinic regulation comes along, content and viewpoint neutrality are eschewed and restrictions are upheld on the slenderest of excuses. *Madsen*, 512 U.S. at 765-767.

A. Outside Of The Abortion Context, Content- and Viewpoint-Based Speech Restrictions Are Presumed To Violate The First Amendment.

Outside of the abortion context, viewpoint-based restrictions upon speech are universally condemned and content-based restrictions are invalidated unless the state can demonstrate that the restrictions are necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

Viewpoint-based distinctions are particularly egregious and are invalidated regardless of the forum in which the speech occurs. *Lamb's Chapel*, 508 U.S. at 394. This Court unequivocally states that "the First

Amendment *forbids* the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others" *Id.* (emphasis added). *See also, Good News Club v. Milford Central School,* 533 U.S. 98 (2001) (invalidating a school access policy that differentially treated a religiously based after-school club). Speech restrictions are permissible only if the regulation is "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

"[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). The state cannot determine by statute "which issues are worth discussing or debating in public facilities." *Id.* There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard. *Id.* When the state permits speech espousing one viewpoint, but prohibits speech offering another, it is "censorship in a most odious form," and granting differential access based upon viewpoint constitutes "invidious discrimination." *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black., J, concurring).

Content-based restrictions, while not

universally invalidated, are presumptively invalid and only rarely upheld. *Brown v. Entm't Merchants Ass'n,* 131 S. Ct. 2729, 2738 (2011). "It is rare that a regulation restricting speech because of its content will ever be permissible" because of the high burden that the state must overcome under strict scrutiny. *Playboy Entm't Grp.*, 529 U.S. at 818. The difficulty in validating content-based restrictions reflects this Court's determination–in any context other than abortion, at least–that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon and Schuster Inc. v. Members of New York State Crime Victims Board,* 502 U.S. 105, 116 (1991)).

Content discrimination is presumptively invalid because it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," which is antithetical to the principle that free speech cannot be restricted because of government hostility or favoritism toward the underlying message. *R.A.V.*, 505 U.S. at 386-387. Consequently, the state may impose reasonable time, place, or manner restrictions on protected speech, but only if the restrictions are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Content-based discrimination is so

antithetical to the First Amendment that this Court will even invalidate statutes that appear to be content-neutral if they unduly constrict the opportunities for free expression. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). Therefore, this Court has held invalid facially content-neutral ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938); handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145-149 (1943), *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-165 (1939); and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76, (1981). Such regulations might be completely free of content or viewpoint discrimination but were found invalid because of the danger they posed to the freedom of speech by eliminating a common means of speaking and thereby suppressing too much speech. *Gilleo*, 512 U.S. at 55.

B. Viewpoint And Content Neutrality Standards Are Significantly Undermined By The Abortion Ad Hoc Nullification Machine.

The Court seems to apply a different standard to laws restricting speech affecting

abortion clinics. *Madsen*, 512 U.S. at 765-767; *Schenck*, 519 U.S. at 377; *Hill*, 530 U.S. at 717;. The Court's stalwart protection of content and viewpoint neutrality is considerably lessened, indeed almost non-existent, when the message involves anything but promotion and support of abortion.

Madsen

In *Madsen*, the Court upheld an injunction that restricted only one viewpoint on the question of abortion. 512 U.S. at 763. In stark contrast to its determination that the government must remain neutral in the marketplace of ideas, *R.A.V.*, 505 U.S. at 386, the *Madsen* Court concluded that "[t]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based." *Madsen*, 512 U.S. at 763.

Although the Court alluded to the content-neutral standard in *R.A.V.*, it distinguished the *Madsen* injunction based upon the nature of an injunction as a remedial tool and the pretense that the plaintiffs had violated a court order. *Id.* "That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order." *Id.* "It suggests only that those in the group whose conduct violated the court's order happen to

share the same opinion regarding abortions being performed at the clinic." *Id.*

Although it refused to find that the injunction was content- or viewpoint-based, the Court also refused to apply the intermediate scrutiny test applied to truly content-neutral speech restrictions, saying it was not "rigorous enough." *Id.* at 765. Again illustrating the special treatment accorded speech affecting the "right to choose," the Court created a new "intermediate-intermediate" scrutiny test based upon whether the challenged provisions of the injunction "burden no more speech than necessary to serve a significant government interest." *Id.*

As was true with the prior restraint analysis, with the content and viewpoint analysis the Court used the "ad hoc nullification machine" to set aside decades of precedent and create a new less-protective standard for speech that the Court acknowledged restricted only one point of view on abortion. As Justice Scalia wrote:

> [T]he judicial creation of a 36–foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are

> profoundly at odds with our First Amendment precedents and traditions....

Id. at 785 (Scalia, J., concurring in part and dissenting in part).

Schenck

In *Schenck,* the Supreme Court again upheld a "buffer zone" injunction that restricted only speech by those opposing abortion. 519 U.S. at 381-383. The Court did not merely affirm the lower court's ruling, but actually formulated the necessary conclusions that the district court had to have reached in order to uphold the injunction. *Id.* The Court rejected the district court's reliance upon a "right to be let alone," (see below), as not a part of the Court's First Amendment jurisprudence. *Id.* at 383. If the injunction had not involved an abortion clinic, the Court's First Amendment jurisprudence would have dictated that the injunction be invalidated as a masked content- and viewpoint-based restriction on speech. *Gilleo*, 512 U.S. at 55.

Eschewing that standard, the Court labored to keep the abortion speech restriction in place. *Schenck*, 519 U.S. at 381-383. The Court therefore created conclusions for the district court out of whole cloth, and then, based upon those non-existent conclusions,

found that the injunction did not violate the First Amendment. *Id.*

As Justice Scalia concluded, the Court's Herculean efforts to save the buffer zone "makes a destructive inroad upon First Amendment law...." *Id.* at 394 (Scalia, J., concurring in part and dissenting in part).

Hill

In *Hill,* the Court explicitly held that a statute imposing a "no-approach" zone of eight feet around people traversing public streets and sidewalks within 100 feet of "health care facilities" was content-neutral. 530 U.S. at 719. Although the law stated that its intent was to prevent the obstruction of entrances to health care facilities, the details of the prohibited conduct belied that purpose. *Id.* at 707.

In particular, the statute made it a misdemeanor to knowingly approach a person without his or her consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id.* Under *Gilleo,* such provisions, even if facially content-neutral, should have been invalidated as inimical to free speech because of "the danger they pose to the freedom of speech by eliminating a common means of speaking and thereby suppressing too much speech." *Gilleo,* 512 U.S. at 55.

However, the Court chose to not look beyond the facial neutrality and see that the statute was carefully calculated to prevent only pro-life speakers from engaging in conversations with women going to abortion clinics. *Hill*, 530 U.S. at 719-720. Instead, the Court insisted that the law was content-neutral. *Id.* at 723. The Court found that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id.* "Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Id.*

"Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Id.* "Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so." *Id.* The Court chose to ignore the fact that speakers with only one viewpoint, namely a pro-life viewpoint, were affected by the prohibition.

As was true in *Madsen*, and particularly in *Schenck*, the Court went out of its way to find justification for a law that under other circumstances would have been invalidated as a content-based restriction on speech. As

Justice Scalia stated, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Id.* at 743 (Scalia, J. dissenting). "A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk." *Id.* at 744. "When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion." *Id.*

McCullen

Building upon *Madsen* and *Hill*, the First Circuit determined that the "no-entry" zone, which does not apply to those associated with the abortion clinics (and therefore would communicate pro-abortion messages), is content-neutral since pro-life speakers can still yell and wear evocative costumes while women are entering the clinics. *McCullen*, 708 F.3d at 13. The court acknowledged that the statute infringes upon the pro-life speakers' rights to converse with clinic patients, but dismissed that effect as not constitutionally significant since there is still somewhere that the speakers can stand. *Id.*

Recognizing that this Court has strayed significantly from its stance against content-based speech restrictions in the context of

abortion, the First Circuit intimates that the principles in *Gilleo* have been effectively overruled for regulations affecting abortion clinics. *Id.* at 14. Based upon that assumption, the First Circuit relegates content-neutrality to a preference instead of a constitutional imperative. *Id.*

The First Circuit's conclusion illustrates how dangerous the abortion "ad hoc nullification machine" has become and the urgent need to dismantle it and return to the speech-protective standards of the pre-*Roe* era.

III. THE ABORTION AD HOC NULLIFCATION MACHINE EXPANDS THE CONCEPT OF CAPTIVE AUDIENCE TO GRANT SPECIAL PROTECTION FROM OFFENSIVE SPEECH TO THOSE SEEKING AN ABORTION.

As states became bolder in their speech restrictions against pro-life protestors, so the Court became bolder in its manipulation of First Amendment principles to uphold the restrictions. *Hill*, 230 U.S. at 716-717. Having already eroded the bedrock principles of invalidating prior restraints and content- and viewpoint-based restrictions, the Court in *Hill* set its sights on the bedrock tenet that it is the speaker, not the listener, who is protected under the First Amendment. *Id.*; *Schenck*, 519

U.S. at 383; *Madsen*, 512 U.S. at 774. The *Hill* court transformed the concept of a "right to be let alone" from government intrusion into the right to be "let alone" from unpleasant messages that might dissuade a woman from getting an abortion. *Hill*, 230 U.S. at 717. In so doing, it placed upon speakers the unreasonable and oppressive burden to not say anything that might offend a listener. *Id.* The Court also granted citizens on the public ways surrounding abortion clinics the same privacy status as a residence in which one can be protected from unwanted messages. *Id.*

The First Amendment has now become so unrecognizable in the abortion context that states can become virtual proponents of abortion with impunity. This case is the latest iteration of that trend.

A. This Court has Consistently Recognized that Protection of Vigorous Debate Requires that the Concept of a "Captive Audience" be Limited to the Home or Similar Intimate Setting.

Recognizing the primacy of the First Amendment's principle that debate on public issues should be "uninhibited, robust and wide-open," *N.Y. Times v. Sullivan*, 376 U.S. at 270,

this Court has only rarely permitted listener discomfort to restrict speech. Those rare instances have centered upon the listener being a genuinely "captive audience," generally in his home, with a recognizable right to be "left alone" from intrusive offensive speech. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Frisby v. Schultz*, 487 U.S. 474 (1988).

Building upon the ancient concept that "a man's home is his castle into which not even the king may enter," this Court first defined the concept of a captive audience when it upheld a federal statute under which a person could require that a mailer remove the person's name from mailing lists and stop all future mailings to the household. *Rowan*, 397 U.S. at 737. The Court found the statute was a logical extension of the "right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property," since the mailer's right to communicate was circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. *Id.*

In *Pacifica Foundation*, the Court found that the pervasive nature of the broadcast media, coupled with the individual's right to privacy in his home, warranted government restrictions against the broadcast of patently offensive and indecent material over the

airwaves. 438 U.S. at 748. Citing to *Rowan*, this Court wrote, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the *privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.*" *Id.* (emphasis added). The Court emphasized that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 745. It is only when patently offensive words are broadcast over the airwaves **so as to invade the privacy of the home** that restrictions on free speech are warranted. *Id.* at 748.

In *Frisby*, this Court again emphasized the difference between the home and other venues when it upheld an ordinance that prohibited picketing "before or about any individual's residence." 487 U.S. at 484. "Although *in many locations, we expect individuals simply to avoid speech they do not want to hear*, (citations omitted) the home is different." *Id.* (emphasis added). "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech **into their own homes** and that the government may protect this freedom." *Id.* at 484-485 (emphasis added). Even though speech

restrictions might be unconstitutional in other contexts, "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society" which justifies regulations aimed at protecting citizens from unwanted intrusions. *Id.* at 484. This Court emphasized that the ability to restrict speech, even in the residential context, is very narrow. *Id.*

The narrowness of the captive audience doctrine was highlighted in *Nationalist Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam). In *Skokie*, this Court required that the Illinois Supreme Court stay an injunction against the National Socialist Party of America, which wanted to hold a pro-Nazi march through a residential neighborhood with a large Jewish population, many of whom were Holocaust survivors. *Skokie*, 432 U.S. at 43. While not ruling on the merits, this Court indicated that the injunction was overly broad and should be significantly modified, if not overturned. *Id.* at 45. What is notable about the *Skokie* decision is that this Court did not assume that the "captive audience" doctrine would apply, even though the Nazi group intended to walk in front of Holocaust survivors' homes displaying messages aimed at displaying the group's hatred for the Jewish people. *Id.*

This Court has consistently said that when individuals are away from home, they are

expected to simply avert their eyes to avoid disagreeable speech rather than infringe on another's First Amendment right. *Cohen v. California*, 403 U.S. 15, 21 (1971). "[T]he mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Id.* In *Cohen,* the petitioner was convicted of disturbing the peace after he entered the Los Angeles County courthouse wearing a jacket with profane language as a means of protesting the Vietnam War. *Id.* at 16.

In striking down the conviction, this Court famously refused to expand the "captive audience" concept to the courthouse setting. *Id.* at 21. "[T]he government may properly act in many situations **to prohibit intrusion into the privacy of the home** of unwelcome views and ideas which cannot be totally banned from the dialogue." *Id.* (emphasis added). This Court reiterated that "'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.'" *Id.* Notably, the Court refused to expand the "captive audience" doctrine in *Cohen* even though in many respects the people in the courthouse could be regarded as being "captive" because they were compelled to be there and could not leave without being penalized.

This Court emphasized the listeners'/observers' responsibility to avert their eyes or ears to avoid offensive or discomforting

messages when outside the home in *Erzonznik v. City of Jacksonville*, 422 U.S. 205, 210-211 (1975). In striking down an ordinance prohibiting nudity at drive-in theaters the Court said: "The Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of [one's] sensibilities simply by averting [one's] eyes.'" *Id.* (citing *Cohen*, 403 U.S. at 21.) The Court further emphasized the difference between the expectation of privacy in the home and the lowered expectation elsewhere. *Id.* at 209. "Such selective restrictions have been upheld **only when the speaker intrudes on the privacy of the home**, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* (emphasis added).

B. When Speech Affecting Abortion Is Involved, Vigorous Debate Has Become Less Important Than Protecting Listeners.

While the Court has found that a public street "does not lose its status as a traditional public forum simply because it runs through a residential neighborhood," *Frisby*, 487 U.S. at

480, apparently it does lose that status when it runs alongside or in front of an abortion clinic. Furthermore, while those compelled to appear in court are not a "captive audience" who can restrict the right to protest a war with profanity, *Cohen,* 403 U.S. at 21, patients who voluntarily arrive at an abortion clinic and voluntarily traverse a public right of way are a "captive audience" who can prohibit pro-life speakers from communicating with them, or even coming within several feet of them. *Hill,* 530 U.S. at 717.

Beginning with the district court in *Schenck,* courts have embraced the idea that a listener/observer, in this case, a woman seeking an abortion, has a right to avoid uncomfortable messages that trumps the rights of pro-life speakers to transmit the messages. 519 U.S. at 383. In *Hill,* that contortion of the First Amendment became part of this Court's abortion "ad hoc nullification machine." 530 U.S. at 716-717. Now, in *McCullen*, the First Circuit has expanded the concept to validate a statute that denies pro-life speakers effective access to patients. *McCullen,* 708 F.3d at 14.

Madsen and Schenck

In *Madsen* and *Schenck* the Court affirmed that "'[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous,

speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Schenck,* 519 U.S. at 383; *Madsen*, 512 U.S. at 774 (quoting *Boos v. Barry*, 485 U.S., at 322). In *Madsen,* the Court rejected the right to be let alone as justification for a 300 foot "no-approach without consent zone" that the Court invalidated. 512 U.S. at 774.

In *Schenck*, the Court specifically rejected the district court's conclusion that a "cease and desist" provision in the injunction was enacted "to protect the right of the people approaching and entering the facilities to be left alone" as not accurately reflecting the Court's First Amendment jurisprudence. 519 U.S. at 383. However, as Justice Scalia pointed out, the district court had relied heavily upon the "right to be left alone" in upholding the injunction. *Id.* at 390 (Scalia, J. dissenting). The seed was already planted.

Hill

By the time of *Hill,* the seed of a new right to be "let alone" from unwelcome speech had fully germinated and grown into a towering tree capable of overshadowing decades of First Amendment jurisprudence.

Rather than focusing on the First Amendment rights of the speakers affected by the Colorado injunction, the *Hill* majority

emphasized the state's need to protect the listeners' right to avoid unwanted communication – even on the public ways -- calling it "an aspect of a broader "right to be let alone." 530 U.S. at 716-717. The majority acknowledged that "'[t]he right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings." *Id.* at 717 (citing *Rowan*, 397 U.S. at 738, and *Frisby*, 487 U.S. at 485). Without citing any precedent, the majority concluded that protecting listeners' rights to avoid unwanted communication applies equally to "confrontational situations" on the public ways, including outside medical facilities. *Id.*

The *Hill* Court equated the "right to be let alone" with the right of free speech (which it called "the freedom to communicate") and said that the two rights had to be balanced when determining whether Colorado's statute was constitutional. *Id.* at 718. Based upon that formulation, the Court found that imposing a "no entry" zone within eight feet of those traversing public streets and sidewalks within 100 feet of a medical facility was constitutional as a legitimate protection of the listener-centered right. *Id.* The majority insisted that the Court had repeatedly recognized the rights of unwilling listeners to be "let alone" as part of its First Amendment jurisprudence, and that extending that right to traversing public streets near medical facilities was consistent with that

jurisprudence. *Id.*

Justice Scalia observed that the "right to be let alone" relied upon by the majority actually contradicted the majority's position. *Id.* at 751 (Scalia, J. dissenting). "To the extent that there can be gleaned from our cases a "right to be let alone' in the sense that Justice Brandeis intended, it is the right of the speaker in the public forum to be free from **government** interference of the sort Colorado has imposed here." *Id.* (emphasis added). "In any event, the Court's attempt to disguise the 'right to be let alone' as a 'governmental interest in protecting the right to be let alone' is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights (which the Court demotes to the status of First Amendment 'interests.')" *Id.* "Suffice it to say that **if protecting people from unwelcome communications** (the governmental interest the Court posits) **is a compelling state interest, the First Amendment is a dead letter**." *Id.* at 748-749 (emphasis added).

"Restrictive views of the First Amendment that have been in dissent since the 1930's suddenly find themselves in the majority." *Id.* at 765. "Uninhibited, robust, and wide open" debate is replaced by the power of the State to protect an unheard-of 'right to be let alone' on the public streets." *Id.* This is the further expansion of the "ad hoc nullification

machine" through which the Court has assaulted pro-life speakers' "individual right to persuade women contemplating abortion that what they are doing is wrong." *Id.* at 742. "Like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts." *Id.*

McCullen

The First Circuit accepted as a given that the concept of "captive audience" was extended to women seeking an abortion and characterized the expanded "captive audience" concept as accepted and established First Amendment jurisprudence. *McCullen*, 708 F.3d at 14.

"In the context of abortion-related demonstrations, the Supreme Court has specifically recognized the interest of clinic patients both 'in avoiding unwanted communication' and 'pass[ing] without obstruction.'" *Id.* (citing *Hill*, 530 U.S. at 716–18). "Consistent with this interest, the First Amendment does not compel prospective **patients seeking to enter an abortion clinic** to make any special effort to expose themselves to the cacophony of political protests." *Id.* (emphasis added). "Nor does it guarantee to the plaintiffs the same quantum of communication that would exist in the total absence of regulation. A diminution in the

amount of speech, in and of itself, does not translate into unconstitutionality." *Id.*

According to the First Circuit, the First Amendment does not require that people traversing public streets and sidewalks be exposed to uncomfortable or unwelcome speech if they are walking along public streets in front of abortion clinics, and the speech offers alternatives to abortion. *See id.* Furthermore, the First Amendment does not really guarantee "free speech" if that speech relates to pro-life messages outside abortion clinics. . This wholesale revision of the First Amendment is the latest iteration of the Court's abortion "ad hoc nullification machine," and illustrates that it is imperative for this Court to dismantle the machine if the First Amendment is to have any continued force.

CONCLUSION

The Court's attempt to carve out an exception to First Amendment precepts for abortion clinic regulation has had devastating effects on bedrock principles of free speech. The First Circuit's validation of content- and viewpoint-based prior restraints on speech is the latest example of the phenomenon known as the "ad hoc nullification machine." The rights of pro-life speakers have been all but eliminated as patients traversing public streets

have been imbued with veto power over the speakers' First Amendment rights.

This Court should take the opportunity this case provides to reverse the damage caused by the "ad hoc nullification machine."

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

Eleanor McCullen, et al.,

Petitioners,

v.

Martha Coakley, Attorney General for the Commonwealth of Massachusetts, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief of Life Legal Defense Foundation and Walter B. Hoye II, as *amici curiae* in Support of Petitioners and Reversal

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INTERESTS OF *AMICI CURIAE*[*]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead to seek out ways to make this expressive activity unlawful.

Amicus Walter B. Hoye II is an individual whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community through public speaking and his web site, Rev. Hoye

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[*] Counsel for all parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation of this brief.

seeks to offer immediate assistance to women seeking abortion, a message he conveys by engaging in one-on-one conversations with them as they approach an abortion clinic in Oakland, California.

In December 2007, the city of Oakland passed an ordinance, similar to the statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), but applying only to non-hospital-affiliated abortion clinics. Rev. Hoye immediately challenged the ordinance in federal court. In 2011, the Ninth Circuit ruled that the ordinance was being enforced unconstitutionally, in that the city's enforcement policy exempted speech "facilitating access" from prosecution. However, the court upheld the ordinance on its face, despite its narrow application to abortion facilities. *Hoye v. Oakland*, 653 F.3d 835, 855 (9th Cir. 2011).

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the ordinance. No patient or other person seeking access to the clinic complained of his conduct, nor did any purported "victim" testify against him at trial. Indeed, no "victim" was ever specified. The complaining witnesses were clinic escorts and personnel.[1] Though the conviction

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[1] In addition to the charges for unlawfully approaching, Rev. Hoye was charged with two counts of violating Oakland Municipal Code 8.52.030(a), for allegedly using "force, threat of force, or physical obstruction" to intimidate escorts on two different dates. See http://www.youtube.com/watch?v=dcKPndbwKsg and http://www.youtube.com/watch?v=CGzQV8JS8II for videos taken on the dates of the alleged intimidation. In each video, the escort allegedly intimidated is the one following Rev. Hoye and covering up his sign with cardboard. One of these escorts testified that Rev. Hoye made her feel uncomfortable when she stood in front of him blocking his sign. She complained of his "passive aggressive" demeanor as demonstrated by a "sense of his trying

was appealed (and ultimately overturned on procedural grounds), the trial court refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years. Rev. Hoye did not agree.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail. Rev. Hoye completed his sentence.

In sum, Rev. Hoye was threatened with two years in jail and in fact went to jail for engaging in undisputedly peaceful, non-obstructive constitutionally protected speech activity on a public sidewalk. Twenty years ago, one would have wondered how that could happen. Now we know the answer: abortion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 20 years ago, this Court decided *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), upholding an injunction that imposed, *inter alia*, a 36-foot speech-free zone around the entrance to an abortion clinic. This Court employed a newly-minted test for assessing the validity for injunctive restrictions on speech: whether the restriction burdens no more speech than necessary to serve significant governmental interests.

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to be so nice." He was acquitted of this charge; the trial court dismissed the charge relating to the other escort.

Six years later, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a state statute creating unique restrictions on core speech activity (leafleting, picketing, and engaging in oral protest, education, or counseling) occurring in the vicinity of medical facilities. While employing the traditional time, place, and manner formulation for assessing the validity of the restrictions, this Court rejected the argument that, by limiting the application of the law to the public forum areas bordering medical facilities, the state was engaged in *de facto* content and viewpoint-discrimination against anti-abortion speakers. The Court also for the first time approved a restriction on speech activity where it was protected speech itself, not the concomitant unprotected conduct or results, which constituted the justification of the law and the gravamen of the offense.

In the 13 years since *Hill* was decided, this Court has not reviewed any case involving free speech rights in the context of anti-abortion speech. Unfortunately, during that time, *Madsen* and *Hill*, each of which was a troubling departure from this Court's earlier First Amendment jurisprudence, together have spawned a new creature, a hybrid of law and injunction that might aptly be dubbed an *injordinance*.

The injordinance is technically a law, in that it is enacted by a legislative body and is enforceable via criminal sanctions against the public at large, with certain legislatively-specified exceptions. However, it also resembles an injunction, in that its application is pinpointed to a particular site or sites and its expansive restrictions on speech are initially justified by the alleged unlawful conduct of individuals at these

particular sites. Moreover, as with an injunction, the injordinance's restrictions are only activated at the request of private parties, who in some instances are also granted the power to enforce them via civil action.

Massachusetts General Law Chapter 266, Section 120E 1/2 (the "Act") is the first example of an injordinance to come before this Court. The net effect of the Act's provisions is that any abortion provider, but only abortion providers, can obtain a sweeping injunction, enforceable against any anti-abortion speaker, simply by asking city employees to paint lines around its place of business.

This Court need not overrule *Madsen* and *Hill* to find the Act unconstitutional. However, amici urge this Court to narrow or overturn its decisions in *Madsen* and *Hill* in light of their role in making laws like the Act—variations of which are appearing all over the country—even thinkable.

ARGUMENT

I. *MADSEN* AND *HILL* SET THE STAGE FOR THE ACT

A. *Madsen* and Governmental Interests

In *Madsen v. Women's Health Center*, this Court upheld portions of an injunction prohibiting First Amendment activity within 36 feet of the entrances to an abortion clinic. The Court found that the in-

junction was content-neutral: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." Id at. 762–63. Nonetheless, this Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." Id. at 764. For that reason, the Court held that injunctive restrictions on speech should be tested under a "somewhat more stringent" standard, namely, whether the restrictions "burden no more speech than necessary to serve a significant *governmental* interest." Id. at 765 (emphasis added). Applying that standard to the various provisions at issue, the Court found that the 36-foot zone around driveway entrances was constitutional.

In formulating the standard as it did, this Court took the first step in blurring the distinction between generally applicable laws and injunctions. This Court had correctly described the operation of an injunction:

> "An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group . . . because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation . . ."

Despite this definition, this Court decided that the measuring stick for the constitutionality of injunctive restrictions on speech should be *governmental*

interests, and particularly those governmental interests that coincide with the interests of the abortion provider plaintiff.

No governmental entity had asserted any interest in the outcome of the litigation between the abortion provider and the defendants in *Madsen*. While a governmental entity *might* assert an interest in protecting a woman's freedom to seek medical services, ensuring public safety and order, and promoting the free flow of pedestrian and vehicular traffic (id. at 767–68), it might also assert an interest in ensuring that women are informed of all options before choosing to have an abortion, protecting the free speech rights of citizens on public sidewalks, and preserving the function of unfettered speech as a safety valve for the heated emotions certain topics generate. Those interests, too, are significant governmental interests. Yet the injunctive restrictions were never measured against those latter interests. Rather, the only governmental interests invoked by this Court and passed down as precedent for lower courts to employ were those that favored the abortion provider plaintiff's efforts to restrict anti-abortion speakers.

The logical result of this Court's reliance on "governmental interests" in upholding injunctions was for courts to become less scrupulous about whether a plaintiff clinic had actually proved the elements of any particular cause of action. If a "combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction," *Madsen*, 512 U.S. at 768, there was no sense in requiring a plaintiff abortion clinic to prove trespass or some other direct but otherwise irrelevant violation of its own rights.

Moreover, al courts would be understandably confused about why injunctions purportedly serving broad governmental interests should apply only to named parties and those acting in concert with them. This Court contributed to that confusion by making pronouncements such as "the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and "the only way to ensure access was to move *all* protesters away from the doorways." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380, 381 (1997)(original emphasis). This Court did not appear to be making any distinctions between enjoined parties and third parties, and consequently, neither did many lower courts and law enforcement personnel called on by abortion clinic plaintiffs to enforce injunctions. *See, e.g., People v. Conrad*, 55 Cal.App.4th 896, 902 (1997) (reversing conviction for violation of injunction based on anti-abortion defendants' "mutuality of purpose" with enjoined parties); *Planned Parenthood v. Garibaldi*, 197 Cal.App.4th 345, 352 (2003) (reversing judgment upholding application of speech restrictive injunction against "all persons with notice").

This Court also failed to explain the role the defendants' prior bad conduct played in applying its new test. After suggesting in *Madsen* that failure to obey a prior injunction was key to a finding that a broader restriction "burdened no more speech than necessary," 512 U.S. at 763, the Court disavowed that factor in *Schenck*. 519 U.S. at 382–83.

This Court's attempt to fit injunctive restrictions on speech into the "governmental interest" mold of generally applicable time, place, and manner restrictions

has led to confusion and error in other lower court decisions, including the First Circuit's decisions below.

B. *Hill* and the Interest in "Avoiding Unwanted Communication"

Although this Court in *Madsen* approved of a 36-foot speech-free zone on the public right-of-way, it struck down a provision prohibiting uninvited approaches of patients, stating unequivocally, "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and ensure access to the clinic." 512 U.S. at 774.

Six years later, in *Hill*, this Court embraced the concept it so clearly rejected in *Madsen*. Ruling on a facial challenge to a Colorado law, this Court upheld a prohibition on unconsented approaches within 8 feet of anyone within 100 feet of the entrance to a medical facility, when that approach was made for the purpose of displaying a sign, handing a leaflet, or engaging in oral protest, education, or counseling. 530 U.S. at 707, 735.

In identifying the governmental interests undergirding the law, this Court began with the general police power to protect the health and safety of their citizens, which "may justify a special focus on impeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715 (citing *Madsen*). The Court also cited the government's self-referential interest in even-handed application of the law.

Pronouncing these interests "unquestionably legitimate," the Court went on to find other interests underlying the law, ones that Colorado itself had not asserted: the interest "in avoiding unwanted communications" and the "'right to be free' from persistent 'importunity, following, and dogging' *after an offer to communicate has been declined.*" *Id.* at 717, 718 (emphasis added).

This Court repeatedly stated that the statute dealt only with protecting "unwilling" listeners from "unwanted" communication after an offer to communicate has been declined. *Id.* at 708, 714, 716, 718, 721, 723, and 727.[2] However, this reading was at odds with the plain language of the statute, which prohibited all uninvited approaches ("unless such other person consents").

This Court's conflating of uninvited approaches with rejected approaches led the First (and Third[3]) Circuit to the logical conclusion that, at least in the context of speech activity outside medical facilities, all approaches are as a matter of law unwanted and intimidating, and the government has an "unquestionably legitimate" interest in prohibiting such approaches.

Well, not *all* approaches. According to this Court's reasoning and holding, the state's interest extended

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[2] Indeed, this Court implied that the statute was only triggered when the person approached took some affirmative action such as declining the offer. 530 U.S. at 734 (emphasis added) ("This statute simply *empowers* private citizens entering a health care facility with *the ability to prevent* a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear").

[3] See *Brown v. Pittsburgh*, 586 F.3d 263 (3rd Cir. 2009), discussed infra at pp. 22–23.

only to prohibiting those approaches made for the purpose of engaging in otherwise constitutionally protected speech activity. As this Court noted, approaches for the purpose of "social or random conversation" were not prohibited. Neither were approaches for the purpose of panhandling, soliciting magazine subscriptions, or raving like a lunatic. Unconsented approaches without any form of oral communication were also unaffected by the statute: one could approach without consent for the purpose of glaring, making an obscene gesture, or fingering the knife at one's side, all without violating the statute.

In sum, a police officer who witnessed an unconsented approach need simply ascertain one point: was the approach made for the purpose of engaging in core First Amendment speech activity? If so, the statute was violated. If not, there was no violation.

Despite this Court's protestations (citing *Madsen*) that the Colorado law was merely a content- and viewpoint-neutral "regulation of the places where some speech may occur," the restriction was more than that. It was not "justified without reference to content of the regulated speech." Rather, as Colorado itself had candidly admitted, speech "against certain medical procedures"[4] is an evil that government may legislate against. This Court's entire line of reasoning in *Hill* concerning the government's interest in preventing "unwanted communications" validated that viewpoint-based purpose.

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[4] Colorado Rev. Statutes § 18-9-122(1).

II. THE ACT COMBINES THE ERRORS OF *HILL* AND *MADSEN*

The salient unconstitutional features of the Act are: 1) singling out abortion clinics for insulation from free speech; 2) exempting pro-abortion speakers from the restrictions, and 3) imposing overbroad restrictions on speech activity. The First Circuit found support for each of these features in *Madsen*, *Hill*, or both.

A. A Restriction on Speech Occurring Only at Abortion Clinics is Presumptively Content- and Viewpoint-Based

The First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its rejection of the analogous argument in *McGuire v. Reilly* (*McGuire I*), 260 F.3d 36, 44–47 (1st Cir. 2001), challenging an earlier version of the Act. *See* Appendix to Petition for Certiorari ("Pet. App.") at 105a. Citing *Madsen* and *Hill*, the First Circuit held in *McGuire I* that the Act's purpose was content-neutral, though it had the "incidental effect" of curbing speech by "some speakers and not others." Continuing to cite *Madsen* and *Hill*, the First Circuit held that the allegedly "content-neutral" purpose was the government's need to "combat" or "curb" the "deleterious secondary effects of anti-abortion protests." These "secondary effects" were established by evidence in legislative hearings that "abortion protesters are particularly aggressive and patients

particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44–46.

In non-abortion-related cases, this Court has explicitly rejected both prongs of this reasoning. First, the "secondary effects" doctrine has been employed by this Court and most of the Circuits exclusively in the context of sexually oriented businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[5] "[L]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (striking down restriction on picketing in front of foreign embassies). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 321. Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, this Court has rejected the attempt to justify speech restrictions based on generalizations about subject matter:

> Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those

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[5] Justice Kennedy has acknowledged that the "secondary effects" test, allowing restrictions on sexually oriented businesses, is "something of a fiction," although a tolerable one in the context of zoning restrictions which have a "built-in legitimate rationale." *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448–49 (2002) (plurality) (Kennedy, J., concurring).

> based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.

Police Department of Chicago v. Mosley, 408 U.S. 92, 100–101 (1972) (emphasis added). Indeed, it would be a soft foundation for free speech and equal protection that would permit the government to restrict speech activity on a hotly debated issue, and, worse, of one side of that issue, based on wholesale stereotyping of that side.[6]

A restriction may be content neutral if it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original emphasis) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).) As is clear from the First Circuit's decision in *McGuire I*, relied on in the instant case, the putatively "content neutral" justification for the statute is the alleged upsetting and disruptive nature of anti-abortion

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[6] Video evidence of the stereotypical confrontational anti-abortion protest is strangely absent from most court records. On the contrary, *see, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 642 (3rd Cir. 2009) (cases at issue "paint a picture, aided in part by DVDs submitted by each of the three plaintiffs, very different from most other abortion clinic protest cases. . . . The [city] defendants have admitted allegations in plaintiffs' complaint as to the absence of physical confrontations of the sort *that frequently accompany anti-abortion proselytizing*") (emphasis added); *Madsen v. Women's Health Center*, 512 U.S 753, 785–90 (1994) (Scalia, J., conc. and diss.) (describing in detail contents of video depicting peaceful demonstration activity; "anyone seriously interested in what this case was about must view this tape").

protests. There is nothing content or viewpoint neutral about a restriction on speech that is directed at particular locations defined by the activity that occurs there, and justified by means of a "broad classification" as to the level of disruptiveness caused by those who protest such activities. Such an ordinance is as blatantly viewpoint based as if the Ordinance said on its face that it only applied to anti-abortion speech.

The First Circuit said that the legislative purpose for the pinpoint focus of the Act was to "mak[e] every effort to restrict as little speech as possible *while combating the deleterious secondary effects of anti-abortion protests*," and that therefore the Act was content-neutral. *McGuire I*, 260 F.3d at 44 (emphasis added). These are contradictory holdings, because restricting "as little speech as possible" of the general population simply enabled the legislature to restrict far more speech of an unpopular minority than would be politically tolerable if the law were more broadly imposed.[7]

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[7] See *Railway Express v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

B. The Exemption for Clinic Employees and Agents Renders the Statute Content- and Viewpoint-Based

As with the argument about the Act's focus on abortion clinics, the First Circuit also rejected Petitioners' challenge to the Act's exemption for clinic agents by citing its treatment of the analogous argument in *McGuire I*. Pet. App. 105a (citing *McGuire I*, 260 F.3d at 45–47). Applying the laxest standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonitions that, like viewpoint-based restrictions, speaker-based restrictions in a public forum are constitutionally impermissible. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one *speaker* over another") (emphasis added). *See also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Instead, relying on *Hill*, the First Circuit ruled that the legislature "rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." 260 F.3d at 46. Indeed, that conclusion rationally follows from the premise that only anti-abortion speech is unwanted speech, as this Court implicitly taught in *Hill*. One would hardly expect clinic employees to engage in anti-abortion speech, the target of the Act.

As Petitioners correctly note, the Attorney General's interpretation that clinic employees are not exempt if they engage in "partisan" speech, and the First Circuit's endorsement of that interpretation, is without any legal effect. Brief for Petitioners at 33–34. However, even if the Attorney General's interpretation were amended to eliminate the blatantly content-based restriction on speech "about abortion," and even if it were incorporated into the statute, such a provision would put the police in the position of evaluating the content of speech and determining which is "partisan." The Ninth Circuit has held that it is unconstitutional to exempt clinic escorts engaging in speech "facilitating access" to an abortion clinic (such as "May I help you into the clinic?") from a law regulating speech activity in the vicinity of abortion clinics. *Hoye v. Oakland*, 653 F.3d 835, 852 (9th Cir. 2011). Under the First Circuit's decisions, however, a clinic escort or employee telling a patient not to listen to the pro-lifers is not engaging in "partisan" speech and is legitimately exempt from the Act's restrictions. *McGuire v. Reilly* (*McGuire II*), 386 F.3d at 51, 52, 64.

When an escort or employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," the First Circuit holds that such speech is neutral and non-partisan. The peaceful pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently. So does the Ninth Circuit.

The Attorney General's interpretation also echoes the inversion of First Amendment values first sanctioned by this Court in *Hill*, where core First Amend-

ment speech on matters of public interest is forbidden under the exact same conditions that "incidental" or "everyday" speech is permitted. *Cf. Hoye*, 663 F.3d at 851, n. 13 ("even if the distinction between purposive and incidental speech could coherently be made, we have said that privileging the latter over the former 'turns the First Amendment on its head.' *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998)").

This Court's First Amendment jurisprudence has never recognized the concept of a justifiable or acceptable amount of content and viewpoint discrimination. Content and viewpoint discrimination are not subject to a balancing test wherein a court need only "envision at least one legitimate reason" (*McGuire I*, *supra*, 260 F.3d at 48) for creating the distinction to render it constitutional. Rather, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen v. Women's Health Center*, 512 U.S. 753, 794 (Scalia, J., concurring in part and dissenting in part). For that reason, the only "legitimate reason" for a content-based distinction is a compelling state interest, which has never been asserted in this case. A viewpoint-based distinction is simply impermissible.

The Court should reverse the ongoing erosion in abortion-related cases of the First Amendment's most fundamental guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

C. The Act's Speech-Free Zone Is Grossly Overbroad for Serving Any Legitimate Governmental Interest

In upholding the Act, the First Circuit noted that the 35-foot fixed buffer zone was slightly smaller than the zone upheld in *Madsen* "under a standard stricter than that which is applicable here." *McCullen v. Coakley* (*McCullen I*)(Pet. App. 111a). The court's *a fortiori* conclusion neglected to note that that zone in *Madsen* would be enforced only against persons who had been found to have interfered with clinic access in the past.

This Court gave no guidance in *Madsen* or *Schenck* as to how much weight to give the defendants' past unlawful behavior when applying the test for whether an injunctive restriction "burdens no more speech than necessary to serve significant governmental interests." This Court did say that this test was "somewhat more stringent" than the "narrowly tailored" standard. So the test for injunctive restrictions on speech is more stringent, but it also is applied only when the enjoined persons have "violated or imminently will violate, some provision of statutory or common law." *Madsen*, 512 U.S. at 765, n.3.

Lower courts are thus put in the position of comparing apples and oranges: speech restrictions against those who have violated the law are evaluated under a "more stringent" standard while speech restrictions against even the most law-abiding speakers are evaluated under a less stringent standard. It is not surprising that courts faced with this conundrum would seize onto this Court's suggestion in *Hill* that anti-

abortion speech in general causes problems, in order to justify finding unprecedented restrictions on speech on public sidewalks to be "narrowly tailored" to serve the governmental interests opposed to allowing such speech.

A second problem with the First Circuit's *a fortiori* reasoning from *Madsen* is that the trial court in *Madsen* fashioned the buffer zone to deal with the specific configuration of the plaintiff clinic and the "narrow confines" around it. *Madsen*, 512 U.S. at 769. Once again, the mismatch between the standards for injunctions and for generally applicable laws is manifest: while a trial court can fashion a buffer zone around a particular site with great precision to make it "burden no more speech than necessary," a statute or ordinance will—at least in theory—apply to numerous sites with various geographical configurations. Everyday experience tells us that a 35-foot buffer zones around entrances and driveways are going to have widely different effects on free speech at different locations.

The incompatibility between narrow tailoring and statutory speech-free zones is seen most strikingly in the First Circuit's treatment of the Petitioners' as-applied challenge. The First Circuit collapsed the narrow tailoring inquiry into the ample alternatives inquiry, following, it asserted, this Court's analytical method in *Hill*. Pet. App. 22a. At two of the three locations at issue, patients never walk on the public sidewalk but instead drive into private parking lots behind the clinics. Therefore, the First Circuit held, the law was narrowly tailored because the demonstra-

tors never had the opportunity to engage in person-to-person communication anyway. Pet. App. 24a–25a.

However, if one considers narrow tailoring properly as a separate element, it defies common sense to hold that pushing speakers 35 feet away from driveway entrances is "narrowly tailored" to ensure access. Cars don't drive on sidewalks. If no one is standing in the driveway or roadway, a car can drive into a clinic parking lot without any impediment at all. A person standing on the sidewalk three feet from the driveway entrance will not interfere with the car's access.[8]

But what if someone *is* standing in the roadway blocking the street? Or what if some anti-abortion person standing on the sidewalk is throwing literature at patients by tying it to rocks and hurling the rocks at their passing cars? Wouldn't a 35-foot zone

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[8] On the other hand, if the interest served by the zones is to allow patients to avoid (i.e., be insulated from) unwanted (i.e., anti-abortion) communications, then the choice of distance is completely arbitrary. In applying its combined narrow tailoring/ample alternative inquiry in *McCullen I*, the First Circuit stated:

> "[T]he 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone. Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

McCullen I, Pet. App. 111a. The same could be said of a 35-yard zone or a 3-mile zone.

be narrowly tailored to serve the governmental interests there?

The answer is, obviously, no, this restriction is not narrowly tailored to address such unlawful conduct. Unfortunately, however, in *Hill*, *Schenck*, and *Madsen* this Court endorsed the use of "bright line prophylactic rules" for dealing with anti-abortion demonstrations, accepting the representations of abortion providers and legislatures that various factors make the obvious and less speech-restrictive solutions, i.e., enforcement of existing laws or injunctions, impracticable.[9] Thus, narrow tailoring ends up being measured against the conduct of some "worst case protester" who (they say) cannot be restrained any other way.

That is, if it is measured at all. The Third Circuit, evaluating a 15-foot buffer zone around clinics (with an exception for clinic personnel), adopted the First Circuit's "secondary effects" reasoning and decided that it was not necessary for the legislature to prove any record of bad conduct before deciding to keep anti-abortion protesters at a distance from clinic entrances. *Brown v. Pittsburgh*, 586 F. 3d 263, 279 n. 17 (3rd Cir. 2009) ("in secondary effects cases such as this, . . . legislatures may look outside of their own regional jurisdiction for evidence substantiating the problem to which a given regulation is addressed"). Having absolved the Pittsburgh city council from the need to establish that a problem existed, the Third Circuit then employed the same argument as did the First Circuit in *McCullen*: because a larger zone was

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[9] These claims of the impractibility of enforcement should be immediately suspect in this age of ubiquitous videorecording.

constitutional under the more exacting standard of *Madsen*, "the smaller zone established by the Ordinance is *a fortiori* constitutionally valid." *Id.* at 276. *See also Clift v. City of Burlington*, 2013 U.S. Dist. LEXIS 21888 at *6, *63 (February 15, 2013) (citing *Madsen* and *Hill* and finding 35-foot buffer zone around abortion clinic entrances and driveways to be narrowly tailored, despite the fact that zone at issue extends over a 228-foot stretch of public sidewalk).

Such an approach is the antithesis of narrow tailoring.

III. THIS COURT SHOULD REJECT ABORTION EXCEPTIONALISM

As suggested by the foregoing, simply reversing the First Circuit's holding that a 35-foot *cordon sanitaire* around abortion clinics is narrowly tailored will not fix the current problems with the Court's First Amendment jurisprudence in the area of abortion clinic protests. Indeed, the problem rests with the very fact that this Court has, or is quite reasonably perceived to have, a specific "well-settled abortion clinic/buffer zone jurisprudence." Pet. App. at 12a, 14a. The Ninth Circuit, citing *Hill*, has joined the First Circuit in explicitly approving the concept of speech restrictions applicable only in the vicinity of abortion clinics. *Hoye* 653 F.3d. at 845. Though the statute at issue in *Brown v. Pittsburgh* applied to all medical facilities, the Third Circuit followed the First Circuit's "secondary effects" reasoning in finding a buffer zone reasonable, thus implicitly approv-

ing speech restrictions that apply only around abortion clinics. *Brown*, supra, 586 F.3d at 279, n.17.

This concept of "abortion exceptionalism" lies at the heart of the problem. As long as governments are permitted to single out sidewalks around abortion clinics as special enclaves in which speech can be restricted, this Court can expect to see an endless stream of restrictions testing the limits of the First Amendment, as well as making a mockery out of that Amendment's guarantee of governmental neutrality in the marketplace of ideas.

The First Circuit justified the singling out of abortion clinics by citing legislative findings showing that "abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44. As discussed above, both of these prongs are impermissible grounds for singling out abortion-related speech and speakers for special restrictions. See Section II(A), supra, pp. 12–14.

The speech activity that takes place outside abortion facilities does indeed differ significantly from similar speech activities at other locations in several ways, but primarily in the challenges that speakers face in communicating their message to their intended audience.

First, the contact between the speaker and his or her intended audience is very brief, even fleeting, unless the listener decides to stop. A sidewalk counselor will ordinarily have only about 5 to 10 seconds from the time the woman gets out of a car, emerges from a parking lot onto the sidewalk, or otherwise enters the ambit of the clinic, to communicate a message before

the woman enters the clinic. Sometimes it will be less time, and frequently, where there is on-site parking, there is no opportunity at all for person-to-person contact. Far from being a captive audience, the woman is an audience in constant motion toward a destination, unless she decides to stop. Any action on the part of the sidewalk counselors that inhibits her movement such as to delay her for, e.g., 10 more seconds, could be prosecuted under federal and numerous state laws and incur harsh penalties—unlike similar actions in other settings. See, e.g., 28 U.S.C. § 248(b)(penalty for making ingress to abortion clinic "unreasonably difficult" is $10,000 fine and/or six months imprisonment).

Second, the message is extremely time-sensitive and personal. The sidewalk counselor's message is not about the "issue" of abortion. While some pro-life advocates use the public streets and sidewalks to engage in education campaigns directed to the general public, the sidewalk counselor's goal is not to hand out hundreds of pamphlets about abortion. Rather, she stands for hours outside an abortion clinic, waiting for the opportunity to speak to the fifteen, twenty, or twenty-five women who will arrive there, scheduled to have an abortion that day. Her message for them frequently takes the form of an invitation to a dialogue: How can I help you? Can I tell you some things that might make you change your mind about what you are about to do? Can I tell you my story, and then, if you want, you can tell me yours?

While there may be some speech settings that present similar aspects of urgency in the face of irrevocability (e.g., standing outside a military recruiting

center, attempting to persuade young people not to enlist), as a general matter, the speech activity outside an abortion clinic is uniquely personal and immediate; if it is not delivered to that woman at that time, it is too late.

Third, unlike in other settings, the woman is often accompanied by—or propelled by, or compelled by—others who have a strong personal interest in her *not* hearing the message and *not* being deflected from her current course. No other speech setting presents the equivalent of highly-motivated parents and boyfriends doing their best to create a barrier to communication with the intended audience.

Fourth, few other settings have the equivalent of clinic escorts who deliberately disrupt and prevent communication between anti-abortion speakers and women patients and who will manipulate any speech restriction to achieve this end.[10] For example, under

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[10] During the criminal proceedings against Rev. Hoye, one of the clinic escorts described their function in court testimony: "I mean, he's going—you know attempting to, you know, hand out literature and talk to them and I'm attempting to, you know, prevent him from doing so." The coordinator of the clinic escorts testified that escorts are trained not to allow the sidewalk counselors' literature to be taken into the clinic, and that they should "explain" to the women that it is "inaccurate, that it is invasive of their privacy, and it is intended to prevent them from exercising their right to reproductive health services."

The escorts would also carry blank pieces of cardboard to, as an escort testified, "block clients from reading what is on his sign." Videos of this activity can be viewed at http://www.youtube.com/watch?v=dcKPndbwKsg and http://www.youtube.com/watch?v=CGzQV8JS8II Rev. Hoye is the man dressed in black, carrying a sign reading "Jesus Loves You and Your Baby. Let Us Help You." The escorts are wearing orange vests and carrying blank pieces of cardboard. To the left of the screen on

the purportedly "exceedingly modest restriction" approved by the Court in *Hill*, the only practical way for sidewalk counselors to hand out leaflets to persons entering the clinic is, as this Court indicated, to "stand[] near the path of oncoming pedestrians and proffer[] his or her material . . ." *Hill*, 530 U.S. at 727. However, while the sidewalk counselors stand still, escorts can surround the women and/or stand directly in front of the sidewalk counselors, making it sufficiently difficult for the women to reach around the escorts for the proffered leaflets, presuming they see the leaflets at all, that most will not make the effort to do so.

On remand from the Ninth Circuit, the District Court in *Hoye v. Oakland* upheld the City's interpretation of "approach" to include extending a hand or arm toward a passer-by. Thus a sidewalk counselor must extend his or her arm with a leaflet *before* a woman gets within eight feet, and then stand motionless like a scarecrow until the woman passes. Moving one's arm around a blocking escort could lead to a violation of the eight-foot rule, and a prosecution as politically motivated and vindictive as that brought against Rev. Hoye. See Interests of Amici, supra, pp. 1–3.

Moreover, the clinic escorts do not act alone in taking advantage of the "content neutral" laws passed to favor them. They are supported by the actions of the clinics. As set forth above, in *Hoye v. Oakland*

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the first video, another orange-vested escort is blocking a sign reading "Abortion stops a beating heart," carried by an 89-year-old woman. Note that this activity was going on with an 8-foot no-approach law in effect.

the Ninth Circuit held that Oakland's enforcement policy was unconstitutionally content-based because it allowed the escorts to approach patients without consent for the purpose of engaging in speech to "facilitate access." 653 F. 3d at 852. In response, Oakland revealed in the proceedings on remand that the abortion clinic at issue had initiated a policy of requiring every patient to agree to be approached by escorts before being able to make an appointment. Thus, to safeguard an ordinance purporting to serve the governmental interest in "ensuring access" to abortion clinics, the clinic denies access to women unless they consent to be approached by persons who will tell them not to listen to the sidewalk counselors.[11]

The Oakland abortion clinic's reaction to a simple requirement of evenhanded enforcement of the law between pro-abortion and anti-abortion speakers outside its clinic illustrates the lengths to which clinics will go to suppress a contrary message. It is easy to foresee that any other "exceedingly modest restrictions" on speech that are enacted by cities or states at the behest of abortion providers will be manipulated wherever possible to favor pro-abortion escorts and

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[11] Rather than women entering clinics being a "captive audience" to anti-abortion speakers, they are better characterized as captives to the escorts' efforts prevent them from hearing speech. For example, in a case in federal district court in Kentucky, an escort testified how she and her fellow escorts would form what they termed a "scrum" around patients by surrounding them in a circle of four to eight escorts with interlocked arms. They discontinued the practice after deciding it was "disempowering the client and their companion and making them perhaps feel more afraid than they needed to." *Holder v. Hamilton*, No. 3:10CV-759-C (W.D. Ky) (deposition testimony of Jane Fitts).

to further diminish the opportunities for anti-abortion speakers.

In sum, while there are indisputably unique aspects to the free speech activity that takes place outside abortion clinics, those aspects, rather than justifying special restrictions on speech, should make courts particularly conscious of how even a seemingly "modest" restriction can create substantial, even insuperable, obstacles to effective, timely communication.

Courts should also be leery of claims that generally applicable laws prohibiting trespass, assault, obstruction, and the like are insufficient to deal with intimidating conduct solely in the vicinity of abortion clinics. If a record shows multiple convictions of anti-abortion protesters under existing laws, with no abatement of the alleged problems, a court might justifiably conclude that stronger medicine was needed for the individuals responsible. However, when the record shows few or no convictions under existing laws, it is more likely that the problems have been exaggerated by ideological foes than that the sidewalk counselors routinely create intolerably intimidating conditions without ever crossing the line into illegality.

CONCLUSION

Amici respectfully request the Court to reverse the decision below and, in particular, to reject the lower court's holding that laws restricting speech only in the vicinity of abortion facilities or medical facilities are constitutionally permissible.

Respectfully submitted this 16th day of September 2013,

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AMICUS CURIAE BRIEF

SEP 16 2013

No. 12-1168

In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK , PETITIONERS,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 11 OTHER STATES FOR PETITIONERS

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QUESTION PRESENTED

Whether the First Circuit erred in upholding Massachusetts' selective-exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

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INTEREST OF *AMICI CURIAE*

The *amici* states recognize that free speech lies at the heart of a free society. *Election Comm'n* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 207–08 (1982). They thus have a fundamental interest in protecting the principle of viewpoint neutrality recognized in this Court's jurisprudence, a principle that would be threatened by allowing the First Circuit's decision below to stand.

Every state has created statutory buffer zones, such as around polling places, within which speech is circumscribed for limited times and for important public purposes. The *amici* states accordingly are interested in preserving their ability to impose valid, viewpoint-neutral buffer zones. But the *amici* States also recognize that state interests could rarely if ever justify regulations on First Amendment freedoms based upon the identity of the speaker or the speaker's viewpoint. *See, e.g., Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is . . . blatant.").

The First Circuit departed from this Court's jurisprudence by concluding that Massachusetts's law—which imposes a buffer zone only around abortion clinics and exempts speakers likely to express *favorable* views about abortion—was viewpoint neutral and served a legitimate purpose. The *amici* states accordingly respectfully request that this Court reverse this erroneous ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every state creates viewpoint-neutral buffer zones around certain discrete events. Every state, for example, protects the right to vote by imposing buffer zones around polling places. And 43 states and the federal government protect the dignity of funerals by imposing buffer zones around them. Here, Massachusetts has chosen a different path: its law discriminates based on the speaker's viewpoint. This distinction is dispositive.

Buffer zones constraining First Amendment freedoms can pass constitutional muster only through limited time, place, and manner restrictions that are viewpoint neutral. Polling-place buffer zones bar everyone—Republican, Democrat, environmental advocate, and Second Amendment supporter—from speaking within the immediate proximity of a polling place on Election Day. Funeral buffer zones also apply to everyone, not just to people presenting a particular point of view. In contrast, Massachusetts's statute allows only employees and agents of abortion clinics to speak, and it isn't hard to guess what their viewpoint on abortion is. When the government draws distinctions based on viewpoint, it has gone too far.

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 430 (1992). And if this principle means anything, it is that this selective-exclusion law must be unconstitutional.

Massachusetts's law discriminates against particular speakers, and particular viewpoints: it categorically exempts from the buffer zone persons obtaining abortion services or speaking on behalf of an abortion provider, while silencing without exception those who would peaceably share another point of view. It cannot be justified on the basis of public safety or patient access, because federal law not challenged here already assures such protections. Further, it is overbroad and not narrowly tailored because even assuming the compelling nature of Massachusetts's purported interests in public safety and patient access, the selective-exclusion statute proscribes far more constitutionally protected conduct than necessary to protect those interests.

For all of these reasons, the *amici* states respectfully request that this Court reverse the First Circuit's decision.

ARGUMENT

I. To be consistent with the First Amendment, buffer zones must be viewpoint neutral.

Buffer zones are necessary in certain circumstances. When such zones are viewpoint neutral and serve important public interests, buffer-zone statutes are routinely upheld.

In *Burson* v. *Freeman*, 504 U.S. 191 (1992), for example, this Court upheld Tennessee's "election day 'campaign-free zone,'" recognizing that although it was content-based, it was narrowly tailored to serve "the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 193, 206.

The Court concluded that the Tennessee statute was content-based because under it, "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Burson*, 504 U.S. at 197. The statute thus limited "public discussion of an entire topic." *Id.* And because the statute was content-based, the Court concluded it "must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 198.

Polling-place buffer zones meet this strict scrutiny because they are narrowly tailored to serve compelling state interests. They are narrowly tailored because they impose only a "minor geographic limitation," *Burson*, 504 U.S. at 210, as the Court described Tennessee's 100-foot boundary around the polls. This interest is also narrow in time—they limit speech only several times a year, during elections, not every day. This narrow limitation thus leaves open ample alternative avenues for communication.

The interests such statutes serve "obviously are compelling ones." *Id.* at 199. "[T]he history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." *Id.* at 206. Buffer zones around polling places combat both of those evils by creating a zone around the polls where speech cannot become intimidating or threatening or be used to assist in election fraud (such as by offering to buy votes).

Indeed, the states' interest in protecting the right to vote are so compelling that all 50 states impose buffer zones around polling places on Election Day.[1] The strength of this interest is why this Court both reaffirmed "[t]hat it is the rare case in which we have held that a law survives strict scrutiny" and concluded that "[t]his, however, is such a rare case." *Id.* at 211.

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[1] Ala. Code § 17-9-50; Alaska Stat. § 15.56.016; Ariz. Rev. Stat. § 16-515(A), (H); Ark. Code Ann. § 7-1-103(a)(9)(A); Cal. Elections Code Ann. § 18370, § 319.5; Colo. Rev. Stat. § 1-13-714; Conn. Gen. Stat. § 9-236(a); Del. Code. Ann. tit. 15, § 4942(a), (d); Fla. Stat. Ann. § 102.031(4)(a)–(b); Ga. Code Ann. § 21-2-414(a); Haw. Stat. § 11-132(a), (d), § 19-6(7); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/17-29(a); Ind. Code § 3-14-3-16, § 3-5-2-10; Iowa Code § 39A.4(1)(a)(1); Kan. Stat. Ann. § 25-2430(a); Ky. Rev. Stat. Ann. § 117.235(3); La. Rev. Stat. § 18-1462(A), as amended by 2013 La. Sess. Law 383; Me. Rev. Stat. Ann. tit. 21-A § 682(2)–(3); Md. Code Ann., Elec. Law Art. 33, § 16-206; 950 Code Mass. Regs. § 53.03(18), § 54.04.22; Mich. Comp. Laws § 168.744(1), (3), § 168.931(1)(b)(iii), (1)(k); Minn. Stat. § 211B.11, § 204C.06; Miss. Code Ann. § 23-15-895, § 23-15-245; Mo. Rev. Stat. § 115.-637(18); Mont. Code Ann. § 13-35-211; Neb. Rev. Stat. § 32-1524(2); Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. § 659:43; N.J. Stat. Ann. § 19:34-6, -15; N.M. Stat. Ann. § 1-20-16; N.Y. Election Law § 8-104(1); N.C. Gen. Stat. § 163-166.4; N.D. Cent. Code § 16.1-10-06, as amended by 2013 N.D. Law ch. 173 (S.B. 2213); Ohio Rev. Code Ann. § 3501.30(A)(4), § 3501.35; Okla. Stat. Ann. tit. 26, § 7-108; Or. Rev. Stat. Ann. § 260.695; 25 Pa. Stat. Ann. § 3060; R.I. Gen. Laws Ann. § 17-19-49; Rhode Island Regulations for Polling Place Conduct § 5(A); S.C. Code Ann. § 17-25-180; S.D. Codified Laws § 12-18-3; Tenn. Code. Ann. § 2-7-111(a); (b)(1); Tex. Elec. Code Ann. § 61.003; Utah Code Ann. § 20A-3-501(1)(a), 2(a); Vt. Stat. Ann. tit. 17, § 2508; Va. Code Ann. § 24.2-604(A); Wash. Rev. Code § 29A.84.510; W. Va. Code § 3-9-9, § 3-1-37; Wis. Stat. § 12.03(2)(b)(1), (2)(d), (4); Wyo. Stat. Ann. § 22-26-113.

There can be little doubt, though, that a polling-place statute would be struck down if it imposed a *viewpoint*-based buffer zone. A buffer zone that allowed Republicans—but not Democrats—to speak at polling places, or that allowed supporters of a particular referendum—but not opponents—to speak, would not survive. Indeed, a lack of viewpoint neutrality undermines a statute's narrow tailoring: after all, voter intimidation could occur on either side of the political aisle, and election fraud could be perpetrated by supporters or opponents of any given cause.

The polling-place statutes that the appellate courts have upheld thus prohibit *all* speakers from engaging in particular conduct from the immediate vicinity of polling places. See *United Food & Comm. Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 751 (6th Cir. 2004) (upholding similar Ohio buffer zone after concluding it was viewpoint neutral). These polling-place buffer zones impose no political or ideological preferences on the messages conveyed, because, for a limited and compelling purpose, they ban all viewpoints equally. See *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored . . . if each activity within the proscription's scope is an appropriately targeted evil.").

In addition to polling places, this Court has also recognized the states' ability to preserve the dignity of funerals through viewpoint-neutral and reasonable time, place, and manner restrictions. *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011).

States have imposed such viewpoint-neutral time, place, and manner restrictions: the federal government and 43 states have enacted funeral buffer-zone laws, none of which exempt particular speakers.[2] And courts have upheld them.

The Sixth Circuit, for example, upheld Ohio's law prohibiting "picketing" or "other protest activities" within 300 feet of a funeral or burial service as a viewpoint-neutral, reasonable time, place, and manner restriction. *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 358 (6th Cir. 2008). The Sixth Circuit recognized that the law was narrowly tailored to address "only the time and place of speech *directed at* a funeral." *Id.* at 368 (emphasis added).

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[2] Ala. Code § 13A-11-17; Ark. Code Ann. § 5-71-230; Cal. Penal Code § 594.35; Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3), -107(3), -108(2),-117,-125; Conn. Gen. Stat. § 53a-183c; Del. Code Ann. tit. 11, § 1303; Fla. Stat. Ann. § 871.01; Ga. Code Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409(2); 720 Ill. Comp. Stat. 5/26-6; Ind. Code §§ 35-45-1-3, -2-1; Iowa Code Ann. § 723.5; Ky. Rev. Stat. Ann. §§ 525.055..060,.145,.155; La. Rev. Stat. § 14:103, as amended by 2013 La. Sess. Law 30 (S.B. 72); Me. Stat. tit. 17-A § 501-A; Md. Code Ann., Crim. Law § 10-205; Mass. Gen. Laws Ann. ch. 272, § 42A; Mich. Comp. Laws §§ 123.1111–.1115, 750.167d; Minn. Stat. § 609.501; Miss. Code Ann. § 97-35-18; Mo. Rev. Stat. §§ 578.501–.502; Mont. Code Ann. § 45-8-116; Neb. Rev. Stat. §§ 28-1320.01-.03; N.H. Rev. Stat. § 644:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. Ann. § 30-20B-1 to -5; N.Y. Penal Laws § 240.21; N.C. Gen. Stat. § 14-288.4; N.D. Cent. Code, § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. tit. 21, § 1380; 18 Pa. Stat. Ann § 7517; R.I. Gen. Laws Ann. § 11-11-1; S.C. Code Ann. § 16-17-525; S.D. Codified Laws §§ 22-13-17 to -20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. §§ 42.04, .055; Utah Code Ann. § 76-9-108; Vt. Stat. Ann. tit. 13, § 3771; Va. Code Ann. § 18.2-415; Wash. Rev. Code § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6-105; 38 U.S.C. § 2413.

The Eighth Circuit recently reached the same conclusion. Although invalidating a provision about protest activities "in front of or about" a funeral as too "indeterminate," the court upheld a 300-foot buffer zone immediately before and after funerals as a "minor time and place restriction." *Phelps-Roper* v. *Koster*, 713 F.3d 942, 951, 954 (8th Cir. 2013).

These funeral buffer-zone statutes are narrowly tailored to protect the compelling interest of preserving the dignity of a funeral. Take Michigan's statute, for example. It imposes a 500-foot buffer zone around funeral services and processions within which no one may make statements or engage in conduct (1) that would make a reasonable person feel intimated, threatened, or harassed; (2) that is intended to incite and actually cause a breach of the peace; or (3) that is intended to disrupt the funeral or procession. Mich. Comp. Laws § 750.167d. The statute thus hones in on the concrete harms that the speech could cause—intimidating funeral attendees, inciting a breach of the peace, and intentional disruption of a funeral. See also, e.g., N.M. Stat. Ann. § 30-20B-3(B) (prohibiting "direct abusive epithets" and "threatening gesture[s] that the person knows or reasonably should know is likely to provoke a violent reaction by another person"); N.D. Cent. Code, § 12.1-31-01.1(2)(b) (prohibiting the display of "any visual images that convey fighting words or actual or veiled threats against any other individual").

These funeral buffer-zone laws proscribe speech without regard to the identity of the speaker or his message he is conveying.

One final type of buffer zone highlights the importance of viewpoint neutrality. Besides Massachusetts, only two other states—Colorado and Montana—have buffer zones around medical facilities. In *Hill* v. *Colorado*, 530 U.S. 703, 725 (2000), this Court held that Colorado's buffer zone around medical facilities was viewpoint-neutral and, under the circumstances in that particular case, constitutional. Like the polling place and funeral statutes discussed above, the Court interpreted Colorado's buffer zone to be viewpoint neutral because its prohibitions on speech did not concern the speaker or his message. Instead, the Court reasoned, the statute applied to all those who "protest[ed]," "counsel[ed]," or "demonstrat[ed]" within eight feet of a person entering the facility, regardless of the message the speaker conveyed. *Id.*

Like Colorado's, Montana's medical-facilities buffer zone is viewpoint neutral within the meaning of *Hill*. Montana's statute applies to *any* "person" who approaches someone entering or leaving a "health care facility" "to protest, counsel, or educate about a health issue." Mont. Code Ann. § 45-8-110(1). Under the analysis of *Hill*, the statute makes no exceptions that favor one side of the abortion debate, but rather applies equally to both.

II. Massachusetts's law is not viewpoint neutral.

In contrast, Massachusetts's statute is not viewpoint neutral. It discriminates against speakers and their viewpoints by exempting from the buffer zone only clinic patients and clinic employees acting within the scope of their employment.

The law imposes a 35-foot buffer zone around facilities "where abortions are offered or performed," within which "[n]o person shall knowingly enter or remain." Mass. Gen. Laws. ch. 266 § 120E 1/2(b). As an initial matter, the fact that the statute applies only to "reproductive health care facilities," which is defined to mean places "where abortions are offered or performed," *id.*, reveals that it is not content neutral. Cf. Colo. Rev. Stat. § 18-9-122 (applying to all facilities authorized to provide medical treatment); Mont. Code Ann. § 45-8-110 (same). Instead, it is directed at the topic of abortion, and not towards speech relating to more general health care issues.

The law applies only to certain speakers. One exemption is innocuous, because it exempts people that are there for reasons unrelated to a viewpoint about abortion—such as construction, utilities workers, and public safety personnel, as well as "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." Mass. Gen. Laws ch. 266 § 120E 1/2(b)(3)–(4). But its other exemption favors those on one side of the abortion debate: it completely exempts from the buffer zone "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment." Mass. Gen. Laws. ch. 266 § 120E 1/2(b)(1)–(2).

By exempting clinic patrons and employees from the buffer zone, Massachusetts's selective-exclusion statute allows those in favor of abortion to speak with impunity in the vicinity of abortion clinics,

while those with a different viewpoint are subject to criminal prosecution for engaging in similar expression. The terms of the statute ensure such a result. Clinic agents and employees are exempt from the buffer zone *only if* they are acting "within the scope of their employment" within the zone. Mass. Gen. Laws. ch. 266 § 120E 1/2(b)(2). To be sure, this includes facilitating physical access to the clinic's services. But that is not all. A clinic agent or employee may also speak freely in favor of abortion within the buffer zone because doing so benefits her employer and puts the content of her speech safely within the "scope of [her] employment."

When this Court upheld Colorado's floating buffer zone around medical facilities in *Hill*, it did so only after concluding that the statute was viewpoint neutral. The "level of neutrality that the Constitution demands," this Court held, is that a statute purporting to abridge First Amendment speech "is not limited to those who oppose abortion. It applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision." *Hill*, 530 U.S. at 725.

Massachusetts's statute falls far short of this level of neutrality. Under the Colorado statute in *Hill* and under Montana's similar medical-facilities statute, if a clinic employee entered the buffer zone and counseled a woman to ignore a pro-life sidewalk counselor, also within the buffer zone, both counselors would violate the law and be subject to applicable penalties.

Here, in contrast, the Massachusetts clinic employee can counsel as she wishes, while the pro-life sidewalk counselor faces jail for expressing her view. The clinic agent can enter the buffer zone and come alongside a woman entering the clinic to encourage her to get an abortion, but no one can come along the woman's other side and educate her about the opposing viewpoint, such as explaining the development of the unborn child she plans to abort.

While Massachusetts might like to argue that the statute is viewpoint-neutral simply because it bans pro- and anti-abortion speakers alike from the buffer zone, its exemption of pro-abortion speakers from the ban completely undermines that argument. To the contrary, the statute's broad exemptions for those likely to be sympathetic to the abortion procedure provide ample opportunities for pro-abortion speech within the buffer zone, while providing no opportunity whatsoever for the expression of a different viewpoint.

Unlike states' viewpoint-neutral buffer zones surrounding polling places, funerals, and even medical facilities, Massachusetts's selective-exclusion law serves no interest other than to give one side of the abortion debate an advantage in expressing its views in public fora. Such regulations offend the First Amendment and are blatantly unconstitutional. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785–86 (1978) ("[W]here . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

III. Massachusetts's law cannot withstand strict scrutiny because it does not serve a compelling state interest and is overbroad.

As an "egregious form of content-discrimination," governmental regulations that discriminate on the basis of a speaker's viewpoint are presumptively invalid. *Hill*, 530 U.S. at 769–70 (citing authorities). Such regulations represent government "censorship in its purest form," and demand a more searching scrutiny than the strict scrutiny to which viewpoint-neutral but content-based restrictions are subjected. *R.A.V.*, 505 U.S. at 430–31. For at least two reasons, Massachusetts's selective-exclusion law cannot survive such scrutiny.

First, even the claimed purpose of the statute is duplicative. According to the State of Massachusetts, the statute was enacted to "increase forthwith [patient access] and public safety at reproductive healthcare facilities." Massachusetts's Brief in Opposition 5. Yet public safety and patient access are already secured through federal laws that the petitioners do not challenge in this case, including a federal statute specifically prohibiting "obstruct[ing], intentionally injur[ing], intimidat[ing], or interfer[ing] with access to reproductive health services." 18 U.S.C. § 248. As this Court has long recognized, the proper way to address this type of conduct is to prohibit that conduct, not the underlying speech. *Schneider* v. *State*, 308 U.S. 147, 162 (1939) (explaining that the way to address littering resulting from leafleting is not to ban leafleting, but to punish "those who actually throw papers on the streets"). Given the existing federal laws, the only effect of this law is to infringe speech.

Second, even if its duplicative purpose were compelling, Massachusetts's selective-exclusion statute is overbroad: it prohibits substantially more constitutionally protected conduct than necessary to ensure public safety and patient access to abortion clinics. *See Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1077 (1991). By its terms, the law prohibits even peaceful and consensual conversations between clinic patrons and pro-life sidewalk counselors within the buffer zone. This peaceful speech poses no public safety concern.

Instead, by expanding the scope of the narrowly tailored federal law not challenged here to proscribe protected speech within the buffer zone, there is little question that the Massachusetts Legislature has restricted expression "because of its message." *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). It is in these situations—"where the government prohibits conduct precisely because of its communicative attributes"—that this Court holds the regulation unconstitutional. *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring).

CONCLUSION

This Court should hold Massachusetts's selective-exclusion law unconstitutional.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF NATIONAL ABORTION FEDERATION & 31 OTHER ORGANIZATIONS COMMITTED TO PROTECTING THE HEALTH AND SAFETY OF REPRODUCTIVE HEALTHCARE PROVIDERS AND THEIR PATIENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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AMICI CURIAE

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American Association of University Women
Association of Reproductive Health Professionals
Black Women's Health Imperative
Catholics for Choice
Feminist Majority Foundation
Hadassah, Women's Zionist Org. of America
Ibis Reproductive Health
Law Students for Reproductive Justice
League of Women Voters of Massachusetts
Medical Students for Choice
NARAL Pro-Choice America
NARAL Pro-Choice Massachusetts
NARAL Pro-Choice New York
National Abortion Federation
National Asian Pacific Women's Forum
National Association of Social Workers and its Massachusetts Chapter
National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Institute for Reproductive Health
National Latina Institute for Reproductive Health
National Organization for Women Foundation
National Partnership for Women and Families
National Women's Health Network
National Women's Law Center
Nursing Students for Choice
Physicians for Reproductive Health
Provide, Inc.
Reproductive Health Access Project
Reproductive Health Technologies Project
Unitarian Universalist Association
Women's Bar Association of Massachusetts

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INTEREST OF AMICI[1]

Amici Curiae are 32 organizations dedicated to women's safe access to reproductive healthcare. Individual statements of interest of the *Amici* are contained in Appendix A. *Amici* believe that buffer zones are critical to the continued safety of reproductive healthcare facilities, patients and providers because they provide a safe area for providers to access their workplace and for patients to obtain reproductive healthcare services. Because this case presents the question whether buffer zone laws are constitutional, *Amici* have a keen interest in the outcome of this case and urge the Court to uphold such laws as being necessary to protect safe access for patients seeking healthcare services.

SUMMARY OF ARGUMENT

Given the severe violence, obstruction and harassment targeting reproductive healthcare facilities, the States have a strong interest in securing the safety of their citizens and women's safe access to reproductive healthcare by appropriately-tailored buffer zone laws. Reproductive healthcare facilities, including in Massachusetts, have faced years of violence and obstruction, persisting to this day. The Massachusetts fixed buffer zone law, Massachusetts Gen. Laws, Ch. 266 § 120E1/2 ("the Act"), is a

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, *Amici* state that no counsel for a party has authored this brief, in whole or in part, and no person, other than *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

constitutional time, place and manner regulation that is narrowly tailored to serve significant State interests in safety and access, while providing ample alternative channels of communication. *Amici* urge this Court to uphold the Act as a constitutional means of protecting reproductive healthcare facilities from continued violence, and ensuring women's safe access to healthcare services.

Indeed, the Act is a necessary response to the State's significant interest in protecting reproductive healthcare providers and their patients. Hundreds of reproductive healthcare facilities have fallen victim to bombings, arsons and butyric acid attacks, causing severe physical injury and millions of dollars of property damage. Numerous physicians and facility workers have been murdered or maimed by individuals opposed to abortion. More than 700 facilities have been blockaded, preventing women seeking a variety of reproductive healthcare services from accessing the facility. Abortion providers have received innumerable threats, pieces of hate mail and harassing phone calls. As a result of these numerous targeted attacks, reproductive healthcare facilities—unlike other healthcare facilities—have spent millions of dollars on security measures, from hiring armed guards to installing bullet-proof glass.

Despite these precautions, reproductive healthcare facilities regularly encounter violence and obstructed access to this day. The most recent murder of a physician who provided abortions occurred in 2009. By 2010, one out of every five reproductive healthcare facilities was afflicted by anti-abortion violence. In 2012 alone, five facilities suffered arsons. From 2007 to 2012, there were at least eight arsons, six attempted arsons or

bombings, 41 incidents of assault and battery, and more than 200 acts of vandalism of facilities.

Much of this violence occurs in the areas immediately surrounding reproductive healthcare facilities. Given this continuing reality, a buffer zone immediately surrounding facility entrances helps secure patient and staff access to the facilities, and is a narrowly-tailored response to the States' significant law enforcement interests. In fact, surveys show that buffer zones have decreased violence, obstruction and intimidation outside of reproductive healthcare facilities. This improved situation compels the continuation, and not the dismantling, of buffer zone laws.

This Court has previously recognized the States' significant interests in securing women's safe access to reproductive healthcare facilities. *See Schenck* v. *Pro-Choice Network of Western NY*, 519 U.S. 357, 376 (1997) (Rehnquist, C.J.) ("[W]e conclude that the governmental interests . . . [in] ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services . . . are certainly significant enough to justify an appropriately tailored" response); *Hill* v. *Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens. . . . That interest may justify a special focus on unimpeded access to health care facilities.") (internal citations and quotation marks omitted).

The Massachusetts buffer zone law promotes substantial governmental interests that cannot be achieved as effectively without the regulation. The Act extends only 35 feet from facility entrances,

protecting safe patient access by preventing persons from entering and remaining in the areas immediately surrounding entrances to reproductive healthcare facilities, yet still providing ample alternative means of communication, as individuals may engage in *any* type of protected First Amendment activity outside its 35-foot radius.

The Act is a valid content- and viewpoint-neutral time, place and manner regulation. It was passed to ensure safe access to facilities, not to suppress any content, and the statute does not distinguish based on content. The statute's application to reproductive healthcare facilities does not make it content-based; rather, it reflects the Commonwealth's substantial interests in ensuring safe access to these facilities given the unrelenting violence targeting such locations. The exception for employee access similarly does not make the statute viewpoint-based: whether employees are allowed to enter the zone does not turn on the content or viewpoint of any message. Rather, the exception simply allows facility staff to enter their workplace.

Accordingly, *Amici* urge this Court to uphold the Massachusetts statute, and allow the States to continue to enact tailored measures to prevent violence and secure safe access for patients in the areas immediately surrounding reproductive healthcare facilities.

ARGUMENT

I. BUFFER ZONE LAWS ARE NECESSARY TO FURTHER THE STATES' INTERESTS IN PUBLIC SAFETY AND WOMEN'S ACCESS TO HEALTHCARE

The States have a significant, indeed compelling, interest in ensuring safe access in the areas immediately surrounding reproductive healthcare facilities, given the extent and current reality of violence, obstruction and harassment targeting such facilities. To this day, reproductive healthcare facilities face the very real threat of violence and obstruction. States should be permitted to pass tailored buffer zone laws in an effort to reduce violence at such facilities and ensure women's safe access to healthcare, particularly because buffer zone laws have been shown to be effective. Massachusetts, like many other States, has a tragic history of anti-abortion violence, and its legislature appropriately concluded that the buffer zone law at issue is both necessary and narrowly tailored to address the Commonwealth's compelling law enforcement concerns.

This Court previously has held that governmental interests in safety and access to reproductive healthcare are "certainly significant enough to justify an appropriately tailored" response. *Schenck*, 519 U.S. 357, 376 (1997) (Rehnquist, C.J.); *see also Hill*, 530 U.S. at 715 (recognizing the state's interest in "unimpeded access to health care facilities").

Moreover, outside of the abortion context, this Court repeatedly has upheld content-neutral (or

even content-based) regulations affecting speech. *See, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Burson* v. *Freeman*, 504 U.S. 191 (1992). And this Court has recognized the strong governmental interests in regulating access to public fora even where violence is not the primary concern. *See Ward*, 491 U.S. at 784, 796 (Kennedy, J.) (New York City has a substantial interest in "ensuring the sufficiency of sound amplification at bandshell events" in Central Park, to protect citizens from unwelcome noise); *Burson*, 504 U.S. at 193-94 (upholding content-based restriction prohibiting the display of campaign material and solicitation of votes within 100 feet of polling place, to protect the right of citizens to vote freely); *Frisby* v. *Schultz*, 487 U.S. 474, 488 (1988) (upholding time, place and manner restriction that prohibited picketing of a single residence); *see also Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011) (Roberts, C.J.) ("even protected speech is not equally permissible in all places and at all times"; "Westboro's choice of where and when to conduct its [peaceful funeral] picketing is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions.") (internal quotation marks omitted).[2] The Court likewise should uphold the Massachusetts statute here.

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[2] In *Snyder*, this Court recognized that 44 states and the federal government now have laws imposing time, place and manner restrictions on funeral picketing, and expressly distinguished those laws from the tort verdict at issue. *Snyder* at 1218. So too, here, the Massachusetts statute is a constitutional time, place and manner restriction.

A. Buffer Zone Laws Are Necessary to Address the Violence, Obstruction and Harassment of Reproductive Healthcare Facilities and Providers That Continues to Jeopardize Their Safety

The history of anti-abortion violence in this country is an important backdrop to the Massachusetts buffer zone law. Indeed, Massachusetts has a tragic history with anti-abortion violence, including shootings at two Boston facilities. Reproductive healthcare facilities uniquely require buffer zones to address the targeted violence and obstruction that continues to this day.

Over the past forty years, abortion opponents have targeted reproductive healthcare facilities with violence, ranging from assaults and blockades to arsons, bombings and murders. Statistical surveys for the years 1977 to 1994 (*see infra* pp. 7-9), 1995 to 2006 (*see infra* p. 13) and 2007 to 2012 (*see infra* pp. 14-16), demonstrate the gravity of this problem. Today, while providers, with law enforcement assistance, have been successful in reducing some forms of violence, the violence has continued and remains a serious concern. As recently as 2009, a physician was murdered by an abortion opponent, and additional anti-abortion violence continues to this day.

1. Violence Against Reproductive Healthcare Facilities from 1977-1994

Initially, the violence against providers took the form of bombings and arsons, continuing through

the 1980s and to today. Beginning in the 1990s, the violence escalated to the murders of abortion providers. For the survey period 1977 to 1994, there were 124 recorded arsons, 29 bombings, and 64 attempted arsons and bombings of facilities.[3] One fire attack destroyed an entire shopping center valued at $1.5 million. David A. Grimes et al., *An Epidemic of Antiabortion Violence in the United States*, 165 AM. J. OBSTET. GYNECOL. 1263, 1265 (1991). Various facilities were forced to interrupt or entirely discontinue providing healthcare services as a result of similar attacks. *Id.* at 1267.

During this same time period, 1,801 incidents of violence against abortion providers were recorded by NAF. *See* Appendix B. These included five murders, 11 attempted murders, 585 acts of vandalism, 225 death threats, and 80 butyric acid attacks. *Id.* In this same time period, abortion providers received at least 311 bomb threats and 1,833 incidents of hate mail or harassing calls. *Id.*

Access to clinic entrances has also been impeded for years, and continues to this day. Thousands of anti-abortion activists have targeted facility entrances, as a tactic to physically prevent access to abortion care. JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 154 (2004). From 1977 to 1994, there were 634 recorded

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[3] *See NAF Violence and Disruption Statistics*, National Abortion Federation (1977-2012), attached as Appendix B. NAF's data derives from law enforcement sources and a monthly member survey, for the U.S. and Canada. The actual number of incidents is likely to be significantly higher, because not all providers report to NAF and not all incidents are reported.

blockades of facility entrances, forcibly preventing patients and staff from entering and temporarily shutting down the affected clinics. *See* Appendix B. At least 33,661 individuals were arrested for incidents of violence and disruption against abortion providers from 1977 to 1994. *Id.* Notably, many of the persons arrested for violent acts had been known around facilities as protesters, who later transitioned to committing bombings and even murder.[4]

These statistics do not account for other forms of terror directed at facility workers, physicians, their children, and even their pets. To cite just a few examples, anti-abortion protesters have followed the children of one physician, have beheaded a facility worker's cat, and have poisoned a physician's three dogs. Michele Wilson & John Lynxwiler, *Abortion Clinic Violence as Terrorism*, 11 TERRORISM 236, 265 (2008).

Abortion opponents attempted to murder at least 11 physicians, clinic employees and volunteers from 1977 to 1994, and succeeded in murdering five in 1993 and 1994 alone. *See* Appendix B.[5] The first

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[4] Shelley Shannon, for example, began by holding signs outside of facilities, and later set fire to multiple facilities and attempted the murder of a physician. JIM RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 351 (1998). Similarly, Paul Hill was a protester outside the facility where he later murdered a physician and his volunteer escort. *Id.* at 349, 351, 362-64 (1998).

[5] NAF's statistics do not include every shooting. For example, as reported by the Senate Report to Freedom of Access to Clinic Entrances Law (FACE), in December 1991, a man wearing a ski mask opened fire at a clinic in Springfield,

reported murder occurred in 1993 when Michael Griffin shot Dr. David Gunn three times in the back as Dr. Gunn emerged from his car in the parking lot behind the facility where Dr. Gunn performed abortions. JIM RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 339-340 (1998).

Shortly after Dr. Gunn's death, Paul Hill wrote a paper in defense of the "justifiable homicide" of abortion providers, and circulated a "Defensive Action" petition endorsing violence. *Id.* at 347. In June 1994, Hill began protesting outside the facility where Dr. John Britton began performing abortions after Dr. Gunn's death. *Id.* at 362. A month later, Hill shot Dr. Britton and his volunteer security escorts, Jim and June Barrett, as their car pulled into the driveway of the facility. *Id.* at 363-64. Hill stood at the facility entrance with pamphlets, waiting for Dr. Britton to arrive. As the Barretts' truck pulled into the driveway, Hill opened fire at point-blank range, killing Dr. Britton and Jim Barrett with shots to the head, and wounding June Barrett. *Id.* at 363-64.

In the same time period, Shelley Shannon, not yet arrested for numerous bombings of west coast facilities, began corresponding with Griffin in jail. After visiting two other anti-abortion convicts in prison, Shannon began preparations for the murder of Dr. George Tiller of Wichita, Kansas. *Id.* at 355. On August 19, 1993, Shannon arrived at Dr. Tiller's facility early in the morning, and remained outside with local activists all afternoon. *Id.* at 356. As Dr.

Missouri, seriously wounding two clinic workers. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993), at 3-5.

Tiller left the facility shortly after 7 p.m., driving out of the parking lot, Shannon fired six shots in close range of his car. Although Dr. Tiller survived this attack, in 2009, anti-abortion activist Scott Roeder murdered Dr. Tiller. *Id.*

The violence continued unabated, reaching the Commonwealth of Massachusetts. On December 30, 1994, John Salvi began a rampage that took him to three reproductive healthcare facilities over two days. *Id.* at 367. In Brookline, Massachusetts, Salvi opened fire at a Planned Parenthood facility, killing the receptionist Shannon Lowney. After murdering Ms. Lowney, Salvi sprayed the room with bullets, and left. J.A. at 57; *Salvi Convicted of Murder in Shootings*, WASHINGTON POST (Mar. 19, 1996). Salvi proceeded to a second Brookline facility, killing the receptionist there, Lee Ann Nichols. RISEN & THOMAS, WRATH OF ANGELS at 367. The next day, he fired gunshots at a reproductive healthcare facility in Norfolk, Virginia, where he was arrested. *Id.* All told, Salvi left seven victims: Lowney and Nichols, plus five others he wounded during his spree. *Id.*

2. Violence Against Reproductive Healthcare Facilities Continued Unabated in the Period 1995-2006

The violence did not subside. Surveys for the second referenced period, between 1995 and 2006, recorded two murders, six attempted murders, two kidnappings, 20 butyric acid attacks, 49 facility arsons, and 12 facility bombings. *See* Appendix B. Physical altercations near reproductive healthcare facilities have been far too common as well, with 62 assaults reported. *Id.* By 2005, nearly one fifth of facilities reported being the target of anti-abortion

violence. *See* Mireille Jacobson & Heather Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services*, 3 AM. ECON. J. 189,190 (2011), *citing* FEMINIST MAJORITY FOUNDATION, *2005 National Clinic Violence Survey*, http://www.feminist.org/research/cvsurveys/clinic_survey2005.pdf (last visited November 14, 2013).

In addition, from 1995 to 2006, 113 blockades were so severe that the facilities were forced to temporarily shut down all services. *See* Appendix B. Facility staff reported receiving 160 death threats. *Id.* Facilities also reported 309 bomb threats and 655 anthrax/bioterrorism threats. *Id.* In fact, while the entire country was terrorized by anthrax attacks after 9/11, reproductive healthcare facilities received 96 hoax devices or suspicious packages between 2002 and 2006. Over 275 facility staff and patients reported being stalked between 1995 and 2006. Such terror takes its toll: a 2005 survey found that 20% of reproductive healthcare facilities experiencing high violence had at least one staff member resign *in that year* due to anti-abortion violence and intimidation. *See* Jacobson & Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services*, at 190, *citing* FEMINIST MAJORITY FOUNDATION, *2005 National Clinic Violence Survey*, http://www.feminist.org/research/cvsurveys/clinic_survey2005.pdf (last visited November 14, 2013).

Tragically, another physician was murdered in 1998. Anti-abortion activist James Kopp waited for Dr. Barnett Slepian, who provided abortions in Buffalo, New York, to return with his family from Synagogue one evening. Kopp shot Dr. Slepian through the doctor's kitchen window, shattering his spine and tearing through his aorta; Dr. Slepian died shortly thereafter. *Murder of New York*

abortion doctor denounced as 'terrorism', CNN, Oct. 24, 1998; *Doctor's Killer Tries to Make Abortion the Issue*, N.Y. TIMES, Jan. 13, 2007.

Kopp was captured in France years later. The FBI reported that Kopp "did not leave the US without assistance, and he did not remain a fugitive without assistance." Ed Vulliamy, Henry McDonald, and Stuart Jeffries, *Abortion death hunt muzzles 'Atomic Dog'*, THE GUARDIAN, Mar. 31, 2001. Sure enough, anti-abortion activists Dennis Malvesi and Laura Marra were arrested in New York for helping Kopp hide from authorities. Frederick Clarkson, *Our Own Terror Cells*, SALON, Jan. 8, 2002. Kopp is also believed to have committed three shootings of abortion providers in Canada and another in New York State. *See* Vuillamy, McDonald, & Jeffries, *Abortion death hunt muzzles 'Atomic Dog.'*

Also in 1998, Eric Rudolph bombed a reproductive healthcare facility in Birmingham, Alabama, killing Robert Sanderson, an off-duty police officer working as a security guard, and permanently injuring nurse Emily Lyons. *Among his victims: A nurse loses sight; receptionist, police officer die in blasts*, USA TODAY, July 5, 2005; SOUTHERN POVERTY LAW CENTER, *Abortion Clinic Bombing Victim Emily Lyons Speaks Out: A terrorist's bombing victim speaks out*, 91 INTELLIGENCE REPORT (Summer 1998). Upon his capture years later, Rudolph also was convicted of bombing the Centennial Olympic Park in Atlanta, Georgia during the 1996 Summer Olympics, killing one mother and injuring 111 bystanders. *See* ARMY OF GOD, *Statement by Eric Rudolph*, http://www.armyofgod.com/EricRudolphStatement.html.

3. *Reproductive Healthcare Facilities Remain Threatened by Violence and Obstructed Access to This Day*

Unfortunately, severe anti-abortion violence has continued in recent years. Just four years ago, in 2009, Dr. George Tiller, who survived the 1993 attempt on his life, was murdered in Wichita, Kansas. *Roeder: No regrets after shooting doctor*, CNN (Jan. 28, 2010). A week earlier, his killer, Scott Roeder, had been seen vandalizing a Kansas facility by putting glue in the door locks. *Suspect in Doctor's Killing Tied to Vandalism Case*, N.Y. TIMES, June 2, 2009. Also in 2009, letters laced with anthrax and signed by the "Army of God" were sent to reproductive healthcare facilities in 12 states. *'Army Of God' Anthrax Threats*, CBS NEWS, February 11, 2009.

Indeed, in 2010, 23.5% of all facilities surveyed by FMF (or approximately 83 out of 357) were affected by severe violence—up from 20% in 2008 and 18.4% in 2005. *See* Appendix D. In addition, in early 2011, when anti-abortion activists discovered that Dr. Mila Means intended to provide abortion services in Wichita after the murder of Dr. Tiller, they began disruptive protests against Dr. Means' family practice, and repeatedly stalked Dr. Means. FEMINIST MAJORITY FOUNDATION, *Anti- Abortion Protesters Block Wichita Abortion Doctor*, http://feminist.org/blog/index.php/2011/02/18/wichita-dr-seeking-to-provide-abortion-blocked/ (last visited November 14, 2013). On New Year's Day 2012, the same facility in Pensacola, Florida where Dr. Britton was murdered was completely destroyed by arson. FEMINIST MAJORITY FOUNDATION, *Anti-Abortion Protesters Block Wichita Abortion Doctor*. Later that year, a New Orleans facility and two

Georgia facilities suffered arson attacks, and a Planned Parenthood in Wisconsin was bombed. FEMINIST MAJORITY FOUNDATION, *Overview of Violence Against Women's Health Clinics*, http://feministcampus.org/wp-content/uploads/2013/08/AdoptAClinic_2013.pdf (last visited November 14, 2013). Also in 2012, activists launched a new website, AbortionDocs.org, to collect detailed information on every abortion provider in the country. Since then, anti-abortion protesters have stalked numerous doctors listed on the site. *Id.*[6]

In all, from 2007 to 2012, there have been 8 reported arsons, 41 incidents of assault and battery and more than 200 acts of vandalism. *See* Appendix B. Five of the arsons and seven incidents of assault and battery occurred in 2012 alone. *Id.* In addition, in this recent period, 6 bombings and arsons were attempted but carried out unsuccessfully. *Id.* Reproductive healthcare facilities also reported 37 bomb threats and 41 death threats. *Id.* And they continue to receive hoax devices and suspicious packages (81 reported during this period). *Id.* Facility staff and patients also continue to be stalked—over 50 reports from 2007 to 2012—often in areas surrounding the facility. *Id.*

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[6] Abortion opponents continue to support the "justifiable murder" of abortion providers. *See* http://www.armyofgod.com/. A "how to" guide for clinic violence remains available. *See* http://www.armyofgod.com/AOGhistory.html; *see also* NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, *Army of God*, http://www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=28 (last visited November 14, 2013).

Today, 92% of recently surveyed facilities report that they are concerned about the safety of their patients and employees in the areas approaching the facility, and nearly 90% report that, within the past two years, patients entering the facility have expressed concern about their personal safety.[7] Additionally, nearly 60% of facilities report that, within the past two years, facility employees have expressed concerns for their personal safety. And, over 80% of facilities have called law enforcement because of safety, access or criminal activity concerns. *See* Appendix C.[8]

Access to healthcare facilities is also a serious, continuing problem. In just the past six years, there have been nearly 30 facility blockades by anti-abortion activists that shut down facilities, preventing patients from accessing healthcare. *See* Appendix B. In 2010, "for the first time since 1999, the percentage of clinics reporting potential FACE

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[7] One *amicus* supporting Petitioners misguidedly argues that protestors have limited psychological or emotional impact on patients. *See* Cato Institute Br. 16. Most significantly, the claim does not address the access and safety concerns that a buffer zone is designed to ameliorate. Moreover, the referenced study actually concluded that "interacting with protesters can be upsetting to women at the time of the visit and may prompt facility staff to provide extra support." Diana Green Foster et al., *Effect of Abortion Protesters on Women's Emotional Response to Abortion*, 87 CONTRACEPTION 87 (2013). In fact, within the past two years, patients of 90% of clinics have expressed concerns for their safety. *See* Appendix C.

[8] NAF's survey of U.S. members, summarized in Appendix C, was conducted in September 2013, with 112 reporting facilities.

violations to federal law enforcement authorities increased." *See* Appendix D. This is consistent with a recent survey finding that almost 9 out of every 10 facility managers has concerns about a patient's ability to access the facility free from unwanted contact. *See* Appendix C. Similarly, at 71% percent of surveyed facilities, patients have reported that within the past two years they had difficulty entering the facility due to persons blocking or attempting to block their access. *Id.*[9]

Unlike other healthcare providers, reproductive healthcare facilities have had to spend substantial sums on safety precautions to protect themselves from the criminal activity that has targeted abortion providers. Eighty-eight percent of facilities report installing alarm systems, and 81% have installed security cameras. Seventy-four percent of facilities

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[9] An American Journal of Obstetrics and Gynecology article called this "epidemic of violence directed against health care providers . . . unique in American medicine," with profound medical and social implications. David A. Grimes et al., *An Epidemic of Antiabortion Violence in the United States*, 165 AM. J. OBSTET. GYNECOL. 1263, 1263 (1991). Hospitals, facilities and doctors have stopped providing abortion services because of the violence. Christopher W. Tomlin, *The Reign of Terror: The Judiciary's Inability to Stop Anti-Abortion Violence Forces Congress Back to the Drawing Board*, 18 LAW & PSYCHOL. REV. 423, 423 (1994). Today, abortions are not available in 87% of U.S counties. THE ALAN GUTTMACHER INSTITUTE, *Facts on Induced Abortion in the United States*, http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited November 14, 2013) ("The most recent survey found that 87% of all U.S. counties have no identifiable abortion provider. In non-metropolitan areas, the figure rises to 97%").

provide access via buzz entry only. Forty-four percent of facilities have bullet proof or resistant glass, and 40% have security personnel.

In sum, staggering amounts of violence, obstruction and intimidation continue to target abortion providers in this country. Existing laws that target criminal enforcement simply do not—and cannot—sufficiently ensure safe access near reproductive healthcare facilities, resulting in the critical need for buffer zone laws like the Massachusetts Act.

B. Buffer Zones Around Facility Entrances Have Been Shown to Reduce Violence, Obstruction and Harassment

It is both unfortunate and indisputable that a significant amount of violence, obstruction and intimidation has occurred at or near the entrances of reproductive healthcare facilities. By definition, bombings and arsons require close proximity to a facility. Blockades likewise must occur at or near a facility entrance. Moreover, the majority of the murders and attempted murders committed against reproductive healthcare providers have occurred within feet of the facility doors. And almost all of the assault and batteries reported by facilities have occurred at or near the facility entrance, where facility staff and patients must traverse.

Significantly, the evidence shows that buffer zone laws have resulted in decreased violence against, and increased access to, reproductive healthcare facilities. The evidence also shows that buffer zone laws have resulted in improved law enforcement protection of facilities. A national survey of all reproductive healthcare facilities,

including NAF members, Planned Parenthood and independent facilities, has found a positive relationship between buffer zone protection and improved law enforcement responses to anti-abortion violence, and between increased levels of law enforcement around facilities and lower levels of violence. *See* Appendix E. In fact, "[n]early half of those clinics with buffer zones or injunctions (46%) believe that these legal protections have prompted improved law enforcement responses to anti-abortion violence and harassment at their clinics." *Id.*

NAF's recent 2013 survey further confirms the safety benefits of buffer zone laws. Fifty-one percent of facilities with buffer zones reported a decrease in criminal activity near the facility after the buffer zone was instituted, and more than half of the responding facilities with buffer zones reported that the zones ameliorated safety concerns. *See* Appendix C. Moreover, 75% of responding facilities with buffer zones stated that the zones improved patient and staff access to the facilities. *Id.* And, of the surveyed facilities without a buffer zone law, three out of four believe that such a law would be beneficial. *Id.* Given the positive relationship between buffer zone laws and improved safety and access, such laws should be maintained and expanded, rather than overturned as Petitioners request.

Indeed, given the evidence, the Massachusetts Act is more than an appropriate legislative response to the continuing violence, intimidation and obstruction that targets reproductive healthcare facilities, staff and patients. Passed in 2007, the Act's purpose is "to increase forthwith public safety at reproductive health care facilities." Act Relative

to Public Safety at Reproductive Health Care Facilities, S.B. 1353, 185th Gen. Court (Mass. Nov. 13, 2007). The preamble to the 2000 predecessor statute provides further detail regarding Massachusetts' purposes: (a) increase public safety in and around facilities; (b) maintain the flow of traffic around the facilities; (c) "enact reasonable time, place and manner restrictions to reconcile and protect first amendment rights of persons to express their views . . . and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm"; and (d) create an environment conducive to safe and effective medical services, including surgical procedures, for patients. 2000 Mass. Acts 1030, 2000 Mass. Legis. Serv. Ch. 217 (West).

To these ends, the Act carves out a safe zone around facilities, prohibiting persons from "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" unless the person is (1) "entering or leaving such facility"; (2) an employee or agent "of such facility acting within the scope of . . . employment"; (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of . . . employment"; or (4) "using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." The Act's legislative history amply demonstrates that reproductive healthcare providers in Massachusetts face threats of violence and intimidation at the Boston facilities now protected by the law. J.A. at 37-44, 61.

While Petitioners suggest that there is no need for a buffer zone law in Massachusetts, they do not—because they cannot—provide evidence that obstruction and violence are no longer a problem at reproductive healthcare facilities in Massachusetts. Petitioners note only that from 2000 to 2007, there were no convictions under the prior floating buffer zone law in Massachusetts. Pet. Br. at 7. This proves nothing. That there were no convictions under the floating buffer zone law, if true, either means (1) that people who previously obstructed facility access generally complied with the ordinance—strong assurance that a buffer zone law is effective; or (2) if record testimony is credited, many violations of the old ordinance occurred, but were difficult to enforce given the floating zone, necessitating passage of the fixed buffer zone law at issue. J.A. 36, 41-63, 67-89. Under either scenario, the Commonwealth's interest in securing safety and patient access remains paramount today.

Indeed, with the Act, the Massachusetts legislature properly recognized the safety and access concerns facing reproductive healthcare facilities and fashioned a buffer zone law that effectively addresses these important governmental interests, while preserving First Amendment activity. As this Court has held, women should not be required to undergo Herculean efforts to obtain reproductive healthcare services. *See Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 772-773 (1994) (Rehnquist, C.J.); *Hill*, 530 U.S. at 716. The Massachusetts Act is a constitutional time, place and manner restriction that falls squarely within this Court's precedents.

II. MASSACHUSETTS' BUFFER ZONE LAW IS A CONSTITUTIONALLY PERMISSIBLE TIME, PLACE AND MANNER RESTRICTION

As demonstrated above, the States have undeniably significant, indeed compelling, law enforcement interests in securing the safety of their citizens and providing safe access to reproductive healthcare facilities. Under the Court's existing precedent, a content-neutral time, place and manner regulation—such as the Act—must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Ward*, 491 U.S. at 791. The Massachusetts statute fully meets this standard: it is narrowly tailored to serve significant State interests and provides ample alternative channels of communication.

A. The Statute is Narrowly Tailored to Serve the Commonwealth's Significant Interests in Safety and Access

This Court twice has upheld fixed buffer zones around reproductive healthcare facilities, under a more stringent tailoring standard than that applied to the content-neutral regulation at issue here. *Madsen*, 512 U.S. at 765, 770 (upholding 36-foot fixed buffer zone); *Schenck*, 519 U.S. at 380 (upholding 15-foot fixed buffer zone). This Court also has upheld a floating buffer zone under the same standard applicable to this case. *Hill*, 530 U.S. at 708, n.1 (upholding 100-foot zone with eight-foot floating bubble). This Court should likewise uphold the Massachusetts statute.

In *Madsen*, the Court upheld a 36-foot buffer zone as applied to the streets, sidewalks and driveways, as a narrowly-tailored "way of ensuring access to the clinic," burdening "no more speech than necessary to accomplish the governmental interest at stake." *Madsen*, 512 U.S. at 768, 770. In *Schenck*, this Court upheld a 15-foot fixed buffer zone "around the doorways, driveways, and driveway entrances" of the facility after recognizing the governmental interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services." 519 U.S. 357, 376, 380 (1997). The governmental interests in those cases are precisely the interests at stake here, requiring the same result. Indeed, Petitioners' argument that the Act is unconstitutional, if accepted, would call *Schenck* and *Madsen* into doubt—and even Petitioners do not suggest that *Schenck* or *Madsen* should be overruled. *Schenck*, 519 U.S. at 376; *Madsen*, 512 U.S. at 771. [10]

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[10] *Madsen* and *Schenck* addressed injunctions and, thus, required a more "exacting" First Amendment analysis than that required for the Massachusetts statute. "[S]ince the [Supreme] Court upheld the buffer zones in *Madsen* and *Schenck* . . finding them sufficiently tailored under a test more exacting than the one applicable here, the buffer zone established by the . . . Ordinance is *a fortiori* constitutionally valid." *Brown* v. *City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (Scirica, C.J.); *see also Madsen*, 512 U.S. at 765 (differences between legislative ordinances and court-ordered injunctions "require a somewhat more stringent application of general First Amendment principles in [the injunction] context.").

Moreover, the Act promotes a substantial governmental interest that could not be achieved as effectively without the law. *Ward*, 491 U.S. at 799. The 35-foot zone is one foot smaller than the fixed zone upheld in *Madsen*, 512 U.S. at 768, 770, and is 65 feet smaller than the floating zone upheld in *Hill*, 530 U.S. at 708, n.1. The Commonwealth has tailored its Act to the well-documented governmental interests in safety and access, consistent with this Court's precedents.

Petitioners' suggestion that the Massachusetts statute is unnecessary because law enforcement has the means to arrest law violators misses the point. The State's interest in safe access is not fully served by prosecuting individuals *after* a crime has been committed. While the Petitioners in this case may be non-violent protesters who aim to speak to patients in a "compassionate and non-confrontational way," the States have a compelling interest in preventing violence by those protestors who do seek to do harm or obstruct access, as the history detailed above and in the Appendix amply demonstrates. *See Hill*, 530 U.S. at 729. Moreover, while injunctions may be effective against a particular enjoined individual, they do not prevent violence by others. Similarly, FACE is an important federal statute that provides criminal and civil remedies after a crime is committed, but it cannot fully address Massachusetts' interest in providing safe access to facilities on a daily basis. Given the repeated violence and obstruction surrounding reproductive healthcare facilities to this day,

Massachusetts properly recognized that the States, too, must act to protect patient access and safety.[11]

Simply put, prosecuting law violators as a penal matter, while critically important, does not address the State's significant interests in securing safe access to healthcare at the point when women are seeking services. Here, the Massachusetts legislature considered the particular facts and circumstances of its jurisdiction, determined that there is a need to protect facility staff and patients rather than wait for the violence to occur, and tailored a zone to ensure safe access. Notably, the Massachusetts legislature passed the current buffer zone law after years of pursuing injunctions and after a seven-year attempt with a floating buffer zone failed to solve the pervasive problems with safety and access around reproductive healthcare facilities. Pet. App. 137a-149a. Although the least restrictive means of ensuring access is not required, *Ward*, 491 U.S. at 798, in Massachusetts no other means has proven effective.

Amici submit that this Court should defer to the Commonwealth's—and other States'—judgment as to the appropriate buffer zone that serves its

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[11] Petitioners' reliance on *Kunz* is misplaced because the law there made it unlawful to hold public worship meetings on any streets without first obtaining a permit, a more sweeping prohibition not justified by a governmental interest in public safety. *Kunz* v. *People of New York*, 340 U.S. 290, 293-4 (1951). The same holds true for *Riley*, where public safety was not an issue and the Court invalidated a definition of reasonable fees applicable to charitable solicitations as not narrowly tailored to the State's interest in preventing fraud. *Riley* v. *National Fed'n of Blind*, 487 U.S. 781, 800-01 (1988).

governmental interests, a judgment that is amply supported by the record and this Court's prior precedents. *See Hill*, 530 U.S. at 729 (upholding state buffer zone as a preventative measure "to protect those who wish to enter health care facilities" as "justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior" and "the best way to provide protection, and, at the same time [offer] clear guidance and avoiding subjectivity, to protect speech itself."); *see also Ward*, 491 U.S. at 800-801; *Schenck*, 519 U.S. at 381; *Madsen*, 512 U.S. at 769-70.

B. The Statute Provides Ample Alternative Means of Communication

The Act, by carving out a limited amount of space around the facility, provides Petitioners ample alternative means to communicate their message, satisfying this Court's First Amendment precedents.

In challenging the Act, Petitioners point to certain differences between the Act and the Colorado statute in *Hill*, but in so doing Petitioners ignore *other* differences that compel affirmance. *See* Pet. Br. 48, 53. First, Petitioners note that under the Colorado statute, willing listeners could be approached within 35 feet while under the Act they could not, ignoring that outside of 35 feet, willing *and* unwilling listeners can be approached under the Act but not under the Colorado statute. Similarly, while leafletters can stand within 35 feet of the facility under the Colorado statute but not under the Act, leafletters under the Act *can*

approach anyone 35 feet outside of the facility, which they could not do under the Colorado statute.

These differences aside, under this Court's time, place and manner precedents, the Massachusetts fixed buffer zone provides ample alternative means of communication and thus satisfies the First Amendment. Under the Act, protesters may engage in *any* type of protected activity just 35 feet away from the facility, including leafleting, picketing, praying, engaging in one-on-one conversations, chanting, screaming, displaying signs and any other First Amendment activity.

Petitioners misguidedly argue that they cannot engage in one-on-one conversations 35 feet away because they cannot identify at that distance those persons who intend to enter the facility. Pet. Br. 13. But, Petitioners can *never* identify with any certainty those persons planning to enter a facility until the person actually enters, nor can they know the particular health service the patient is seeking without having a conversation. Thus, under Petitioners' own theory, whether they are within or without the 35-foot radius, they must confront a walking stranger and ask whether she is intending to obtain an abortion and, if so, whether she would like to discuss that topic with Petitioners. There is no significant difference between making this approach 10 feet outside of a facility or 35 feet outside of the facility.[12]

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[12] Petitioners' challenge to the Act is based almost entirely on the premise that they allegedly are prevented from having one-on-one communications. Notably, Petitioners do not contend that the *public* debate on abortion is impacted by the buffer zone law. *See, e.g. Snyder*, 131 S. Ct. at 1222-23, 12227

Accordingly, since the one-on-one approaches advocated by Petitioners are available 35 feet from the facility, the Act provides ample alternative means of this form of communication as well as all other forms of First Amendment activity. *Hill*, 530 U.S. at 715, 719; *see also Frisby*, 487 U.S. at 483-84; *Ward*, 491 U.S. at 802. It is constitutional.

C. The Statute is Both Content- and Viewpoint-Neutral

The Massachusetts statute is both content- and viewpoint-neutral. A statute is content-based where the government adopted the regulation "because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. Similarly, a statute is viewpoint-based when it discriminates based on the speaker's viewpoint. *Hill*, 530 U.S. at 719-20. The Massachusetts statute is neither.

Indeed, there is no evidence that the Act was passed to suppress content either generally or with reference to a particular viewpoint. Rather, its Preamble makes clear that the purpose of the statute is to ensure public safety and access to healthcare. An Act Relative to Public Safety at Reproductive Health Care Facilities, S.B. 1353, 185th Gen. Court (Mass. Nov. 13, 2007) (the purpose

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(Alito, J., dissenting) (The First Amendment did not give Westboro church license to engage in any and all speech directed solely at a private person, even though the church had "strong opinions on certain moral, religious, and political issues"; further, "there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability.").

of the act "is to increase forthwith public safety at reproductive health care facilities").

Petitioners do not argue that the Massachusetts legislature's motivation was to suppress particular content, suggesting instead that "as a practical matter" the law "affects speech on only one issue" and "only one side." Pet. Br. 23. But, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citation omitted). The Act serves such content-neutral purposes.

Put simply, the Massachusetts statute regulates conduct, not speech. The statute neither prohibits nor allows particular content, but simply regulates the place where individuals may not congregate, a regulation necessary to serve significant State interests in permitting safe entry to the facility within the 35-foot buffer zone. Notably, Petitioners concede that the statute regulates conduct and not speech when they argue that the space is off-limits to anyone "who wants to enter the area near the clinic entrances to speak about abortion (*or anything else*)." Pet. Br. 40 (*emphasis added*). Moreover, contrary to Petitioners' suggestion, the statute conforms with *Hill* because "[i]t is not limited to those who oppose abortion. . . . It applies . . . to all demonstrators whether or not the demonstration concerns abortion and whether they oppose or support . . . an abortion decision." Pet. Br. 20 (citing *Hill*, 530 U.S. at 725). Pro-choice picketers, and all other picketers, are equally disallowed from entering and remaining in the buffer zone. "That is the level of neutrality that the Constitution demands." *Id.*

Nor does the statute's application to reproductive healthcare facilities make it content-based. Pet. Br. 23-25. Indeed, Petitioners' argument makes little sense from a First Amendment perspective, as it would broaden the reach of buffer zones to facilities where they are not needed. Here, instead, the Act's targeted application is a narrowly-tailored, content-neutral response to documented safety and access problems near reproductive healthcare facilities, a status not applicable "outside every building in the State." Pet. Br. 24. As demonstrated above, the anti-abortion movement has a long history of violence and obstruction surrounding reproductive healthcare facilities that simply is not applicable to all buildings or even all healthcare facilities. *See, e.g.*, Grimes et al., *An Epidemic of Antiabortion Violence in the United States* at 1263 (the epidemic of violence against abortion providers is "unique in American medicine").

The law has long recognized that the government permissibly may target the locations where its interests in securing safety and access are most in jeopardy—and this principle applies fully to this case. *See, e.g.*, *Boos* v. *Barry*, 485 U.S. 312 (1985) (Washington D.C. statute prohibiting congregations within 500 feet of a foreign embassy upheld due to security concerns); *Burson*, 504 U.S. at 198-99 (upholding content-based state prohibition on electioneering within 100 feet of entrance to polling place, as serving state interests in protecting the right to vote freely and the integrity of elections); *Hill*, 530 U.S. at 724 (rejecting "theory that a statute restricting speech becomes unconstitutionally content-based because of its application to the specific locations where that discourse occurs"); *see also Menotti* v. *City of Seattle*, 409 F.3d 1113, 1120-21, 1123 (9th Cir. 2005) (order

establishing daytime curfew in downtown Seattle during WTO conference and accompanying protests upheld as constitutional time, place, and manner restriction to maintain order and peace, even though peaceful protesters were restricted).

The exception for employee access does not make the Act content- or viewpoint-based, either. Pet. Br. 27-28. The purpose of the employee exception has nothing to do with speech but instead ensures that facility staff are permitted passage to their workplace. That employees must enter the zone in order to access their workplace does not turn on the content or viewpoint of any message, but on their need to get to work. *Compare Snyder*, 131 S. Ct. at 1219 ("any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed"); *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010) (finding that statute outlawing material support to terrorists "regulates speech on the basis of its content" because whether plaintiffs may speak to particular groups "depends on what they say").

Petitioners' argument that the exception is viewpoint-based also relies on the incorrect assumption that, *by walking* through the zone into the facility, employees are expressing a particular viewpoint. Pet. Br. 28. Moreover, even putting aside that walking is conduct and not speech, Petitioners incorrectly assume that facility employees in the zone are there to advocate a particular viewpoint. Rather, they are there to access their workplace.

Likewise, other agents of the facility, such as escorts or armed guards, are permitted to enter the buffer zone because they are providing *services*

related to safety, not to express any particular viewpoint. In fact, of those reproductive healthcare facilities that train escorts, 82% train escorts that they shall *not* advocate views on abortion when servicing the facility. *See* Appendix C. Nor is there evidence that facility employees or volunteers utilize buffer zones to encourage women to get abortions.[13]

Petitioners also suggest, inaccurately, that women entering reproductive healthcare facilities are not informed of their options. In fact, like any other medical procedure, an abortion procedure is performed only after the patient is informed of alternatives. For example, NAF's *Clinical Policy Guidelines* dictate that the "practitioner must ensure that appropriate personnel have a discussion with the patient in which accurate information is provided about the procedure *and its alternatives, and the potential risks and benefits*." (emphasis added) "There must be documentation that the patient affirms that she understands the procedure and its alternatives, and the potential risks and benefits; and that her decision is voluntary." NATIONAL ABORTION FEDERATION, *2013 Clinical Policy Guidelines*, at 3 *available at* http://www.prochoice.org/pubs_research/publications/documents/2013NAFCPGsforweb.pdf (last visited November 14, 2013). Moreover, "[e]ach patient must have a private opportunity to discuss issues and concerns about her abortion," and "[i]nformation about clinical procedures, aftercare,

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[13] Petitioners' citations allegedly quoting clinic agents who "say things like 'abortion is legal'" are hearsay statements by anti-abortion protesters, allegedly characterizing speech. Pet. Br. 28.

and birth control must be available to patients at the facility." *Id.*[14]

In short, the employee exception simply allows people who provide medical and other services to enter the facility where they work. Without this exception, employees could not do their jobs and the facilities could not operate. The Act contains a separate exception for those who must enter and exit the facility (an exception that is not challenged by Petitioners), but that exception does not account for all staff activity. For example, armed guards must stand near the facility entrance, and thus would violate the buffer zone if not for the employee/agent exception.

It also is notable that the Massachusetts Attorney General has construed the statute so that employees are not permitted to engage in any partisan speech. J.A. at 93. "[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Ward*, 491 U.S. at 795-96 (citation omitted). As such, any prohibition on speech applies neutrally to all

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[14] Certain *amici* supporting Petitioners state that women may be receptive to alternatives when considering an abortion and that women benefit from hearing the full debate. *See* Democrats for Life Br. 12-16; Eagle Forum Br. 7-9. But, these *amici* incorrectly assume both that women entering a facility have not considered alternatives and that alternatives are not explained *as with any other medical procedure*. Moreover, there is nothing about the buffer zone itself that prevents women from hearing the full debate. That debate can still occur 35 feet away, if women are receptive to Petitioners' entreaties.

persons in the buffer zone. Petitioners' citation to *Hoye* v. *City of Oakland* does not support their argument. In that case, the Ninth Circuit found a buffer zone statute facially constitutional, but ruled that it was being applied in a content-based manner because the City of Oakland had a policy of enforcing the statute to favor speakers on one side of the debate. 553 F.3d 835, 843, 849 (9th Cir. 2011). The Massachusetts policy as issued by the Attorney General does exactly the opposite.

Accordingly, this Court should uphold the Act as a constitutional content- and viewpoint-neutral time, place and manner restriction.

III. THIS COURT SHOULD DEFER TO THE JUDGMENT OF INDIVIDUAL STATES THAT ENACT BUFFER ZONE LAWS AS NECESSARY TO PROTECT PUBLIC SAFETY AND WOMEN'S ACCESS TO HEALTHCARE IN THEIR JURISDICTION

As demonstrated above, given the continual violence and obstruction targeted at reproductive healthcare facilities, the staff and patients of such facilities are in particular need of protection in the areas at or near facility entrances. In fact, significant violence has occurred right outside facilities—including at least six of eight murders, 42 bombings, and 181 arsons. *See* Appendix B. Hundreds of facility blockades have occurred at facility entrances. *Id.* Death threats, bomb threats, and other forms of intimidation of facility staff number in the thousands. *Id.* Nowhere else in the United States can one find this kind of sustained

campaign of violence and intimidation targeting a particular place of business.

This violent experience has caused state and local governments, concerned about the safety of their citizens and women's access to healthcare, to fashion laws that take into account the particular needs of their locality, while providing ample means of First Amendment communication. That is precisely what Massachusetts did here, and for good reason: The evidence shows that buffer zone laws are effective in achieving these important governmental interests. In fact, over three-quarters of recently surveyed facilities with buffer zones state that the zones improved patient and staff access to the facilities, and over half of these facilities state that buffer zones also reduced safety concerns. *See* Appendix C.

As the Court recognized in *Hill*, "whether or not the [buffer zone] is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the [State] Legislature." *Hill*, 530 U.S. at 727; *accord Madsen*, 512 U.S at 769-770 ("some deference must be given to the state court's familiarity with the facts and the background of the dispute . . . even under our heightened review"); *see also Shelby County* v. *Holder*, 133 S. Ct. 2612, 2623 (2013) ("States retain broad autonomy in structuring their governments and pursuing legislative objectives."). This principle holds true here.

Finally, this Court should not accept Petitioners' invitation to overrule *Hill*. While this case concerns abortion facilities, Petitioners' criticism of *Hill* amounts to a broadside attack on the Court's entire time, place and manner jurisprudence. *See* Pet. Br.

53-56. Petitioners argue that *Hill* upheld a law barring (at a particular time, place, and manner) peaceful speech about a "profound moral issue" on a public sidewalk. *Id.* at 54. But this argument, if accepted, cannot logically be limited to the abortion context. Indeed, the Court of Appeals here appropriately followed settled doctrine—applicable in all contexts—that allows States to regulate speech—even speech on a public sidewalk—when a governmental interest is at stake. *See, e.g., Frisby* 487 U.S. at 489 (upholding ordinance prohibiting picketing near a residence or dwelling of any individual as a valid time, place, and manner law); *see also Snyder*, 131 S. Ct. at 1218 ("Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions that are consistent with the standards announced in this Court's precedents.") (*dicta*); *Burson*, 504 U.S. at 211 (upholding content-based state statutes prohibiting solicitation of votes and display of campaign materials within 100 feet of entrance to polling place on election day).

Accordingly, under this Court's precedents, the judgment of the Court of Appeals should be affirmed, and this Court should hold that the Massachusetts buffer zone law is a constitutional time, place and manner regulation.

CONCLUSION

For all of the reasons above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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Appendix A:
Individual Statements of Interest
of *Amici Curiae*

Abortion Care Network

The Abortion Care Network (ACN) is a national nonprofit made up of independent abortion providers and allies. ACN works to heal the stigma that harms both women and abortion providers and is committed to creating a community that supports the right of all people to experience dignified and respectful abortion care. ACN has been a pioneer in encouraging a deep and honest national conversation about the nuances and complexities of abortion. ACN knows that every day good women make tough choices—and sometimes they choose abortion. And ACN knows that for the past four decades abortion providers have endured unspeakable abuse that would not have been accepted if directed to any other segment of society. ACN has continued to provide excellent care because women need it.

American Association of University Women

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then, AAUW has worked to break through barriers for women and girls through research, advocacy, and philanthropy. Today, AAUW has approximately 170,000 bipartisan members and supporters, approximately 1,000 branches, and approximately 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and among them are

reproductive rights. In adherence to our member-adopted Public Policy Program, AAUW supports choice in the determination of one's reproductive life and increased access to quality, affordable healthcare and family planning services, including expansion of patients' rights.

Association of Reproductive Health Professionals

Association of Reproductive Health Professionals (ARHP), founded in 1963, is a multidisciplinary association of professionals who provide reproductive health services and education, conduct reproductive health research, and impact reproductive health policy. ARHP educates all members of the healthcare team, and fosters research and advocacy to improve reproductive health. Our members define sexual and reproductive health in broad terms to incorporate family planning and abortion, and recognize that the best care is delivered through a team of professionals partnering with an informed patient. ARHP delivers on our educational mission by translating good science into practice through producing accredited, peer-reviewed training and education programs. We support all safety measures, including appropriate buffer zones, that help protect family planning and abortion providers and their clients.

The Black Women's Health Imperative

The Black Women's Health Imperative (Imperative) is the only organization devoted solely to advancing the health and wellness of America's 19.5 million Black women and girls through

advocacy, community health and wellness education and leadership development. The Imperative seeks to improve the health and wellness of Black women by providing health resources and information, promoting advocacy and health policies, and interpreting and issuing reports on relevant research about the health status of America's Black women. We offer our members culturally appropriate tools and information to be an informed and empowered healthcare consumer.

Catholics for Choice

Catholics for Choice is a nonprofit organization that shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the moral capacity of women and men to make decisions about their lives.

Feminist Majority Foundation

The Feminist Majority Foundation (FMF), founded in 1987, is the largest feminist research and action organization dedicated to women's equality and reproductive health. FMF's programs focus on advancing the legal, social and political equality of women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and development programs. FMF has filed numerous *amicus curiae* briefs in the United States Supreme Court and the federal circuit courts to advance the opportunities for women and girls.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting healthcare, education and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women in the United States. Hadassah is a longstanding advocate for the right of reproductive choice and strongly supports ensuring safe access to healthcare facilities, while preserving freedom of speech.

Ibis Reproductive Health

Ibis Reproductive Health aims to improve women's reproductive autonomy, choices, and health worldwide. We conduct original clinical and social science research in order to identify barriers to access and test new ways to deliver services and inform women about their reproductive health options. We perform analysis to document the impact of existing policies and inform recommendations for change, and we partner with advocates, providers, and policymakers who can use our research to promote improvements in policy and service-delivery practice.

Law Students for Reproductive Justice

Law Students for Reproductive Justice (LSRJ) trains and mobilizes law students and lawyers across the country to foster legal expertise and support for the realization of reproductive justice. LSRJ believes that reproductive justice will exist when all people can exercise the rights and access

the resources they need to thrive and to decide whether, when, and how to parent children with dignity, free from discrimination, coercion, or violence. As such, LSJR believes that buffer zones are critical for the protection of an individual's right and ability to access safe reproductive healthcare services.

The League of Women Voters of Massachusetts

The League of Women Voters of Massachusetts (LWVMA) was founded in 1920, the year the 19th amendment gave women the right to vote. The LWVMA is part of a nonpartisan, citizens' organization with national, state, and local levels. In addition to the national LWV, there are more than 800 strong state and local Leagues in all 50 states and the District of Columbia, the Virgin Islands, and Hong Kong. A grassroots, volunteer-driven organization comprised of more than 140,000 members and supporters, Leagues form opinions after careful research, study and consensus of members. For 93 years, the mission of LWVMA, one of the nation's largest state Leagues, has been to encourage informed and active participation in government, increase understanding of major public policy issues, and to influence public policy through education and advocacy within the Commonwealth of Massachusetts. At all levels, the League has a long history of supporting a woman's right of privacy to make personal reproductive choices. Since 1973, LWVMA has actively worked, through both legislative and judicial means, to guarantee that women can exercise this right in a safe environment.

Medical Students for Choice

Medical Students for Choice works to preserve access to safe abortion services by ensuring that medical students are trained and willing to provide abortion care. The safety of abortion-providing physicians and staff is critical to ensuring that physicians continue to be willing to provide this vital service for women, and buffer zones have proven to be a useful legal protection for these courageous physicians.

NARAL Pro-Choice America

NARAL Pro-Choice America is a national advocacy organization, dedicated since 1969 to supporting and protecting, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, organizing, and influencing public policy. Enactment and enforcement of effective and appropriate clinic protection laws, like the Massachusetts buffer zone statute, is vital to this goal and to ensuring women safe access to critical healthcare.

NARAL Pro-Choice Massachusetts

NARAL Pro-Choice Massachusetts is a statewide grassroots organization with more than 20,000 members in Massachusetts dedicated to promoting full and equal access to reproductive healthcare services, including preventative care, preventing unintended pregnancies, choosing safe, legal abortion, and bearing healthy children. NARAL Pro-Choice Massachusetts advocates on behalf of women, family planning providers, and abortion providers across the state and recognizes that the

buffer zone has been a successful tool in allowing the women of Massachusetts to access basic healthcare without intimidation or fear.

NARAL Pro-Choice New York

NARAL Pro-Choice New York is a political and advocacy organization whose mission is to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. We work in New York at the state and local levels to pass proactive, pro-choice legislation and were instrumental in the passage of a New York City ordinance protecting access to abortion care clinics.

National Abortion Federation

The National Abortion Federation (NAF), a nonprofit organization founded in 1977, is the professional association of abortion providers in North America. NAF's members include nearly 400 nonprofit and private facilities, women's health centers, hospitals and private physicians' offices. NAF acts as an advocate for provider protection with all levels of law enforcement; tracks and informs its members about anti-abortion violence; and conducts on-site security assessments and training for facility staff to assist with safety concerns.

National Asian Pacific American Women's Forum

National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander (API) women's

organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for API women and girls.

National Association of Social Workers and its Massachusetts Chapter

Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with nearly 135,000 members and 55 chapters throughout the United States and internationally. The NASW-Massachusetts Chapter represents 7,700 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. The NASW policy, *Family Planning and Reproductive Choice*, states, "The NASW position concerning family planning, abortion, and other reproductive health services is based on the bedrock principles of self-determination, human rights, and social justice: Every individual, within the context of her value system, must have access to family planning, abortion, and other reproductive health services... in a manner that is ...voluntary and preserve[s] the individual's right to privacy." SOCIAL WORK SPEAKS 129, 132 (9th ed., 2012). NASW supports "[a] woman's right to obtain an abortion, performed according to accepted medical standards and in an environment free of harassment or threat for both patients and providers." *Id.* at 133.

National Council of Jewish Women

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that we endorse and resolve to work for laws, policies, programs, and services that protect every woman from all forms of abuse, exploitation, harassment and violence; comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay; and the protection of every female's right to reproductive choices, including safe and legal abortion, medically accurate information, access to contraception, and the elimination of obstacles that limit reproductive freedom.

National Family Planning and Reproductive Health Association

Founded in 1971 and located in Washington, D.C., the National Family Planning & Reproductive Health Association (NFPRHA) is a nonprofit membership organization representing the broad spectrum of family planning administrators and providers who serve the nation's low-income, under-insured, and uninsured women and men. NFPRHA's membership includes approximately 550 organizational members that operate or fund a network of nearly 5,000 safety-net health centers and service sites in 49 states and the District of Columbia. Given the long history of violence and intimidation that has occurred at reproductive

health clinics, NFPRHA supports measures such as buffer zones that help protect health center staff and the patients they serve.

National Institute for Reproductive Health

The National Institute for Reproductive Health engages in bold advocacy, creative education campaigns, and high-impact local partnerships in states and localities across the country to promote reproductive rights and expand access to reproductive healthcare, reduce unintended pregnancies, and empower youth to make healthy sexual and reproductive decisions. The Institute believes ensuring women have safe and unencumbered access to reproductive healthcare facilities is vital to women's health and well-being, and has supported efforts related to protecting access to abortion care clinics.

National Latina Institute for Reproductive Health

Amicus curiae National Latina Institute for Reproductive Health ("NLIRH") is the only national organization working on behalf of the reproductive health and justice of the 24 million Latinas, their families, and communities in the United States through public education, community mobilization, and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, geography, gender, racial and ethnic discrimination, sexual orientation and gender identity, and immigration status. These circumstances make it especially difficult for Latinas to access the full range of reproductive healthcare, including abortion services. Latinas are twice as likely to experience unintended

pregnancies than their white peers, making access to abortion care without barriers a priority for Latina health. Therefore, the issues addressed in this case are central concerns to the organization.

National Organization for Women Foundation

The National Organization for Women (NOW) Foundation is a nonprofit organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters with chapters in every state and the District of Columbia. The litigation efforts of the Foundation seek to protect reproductive health options, as well as focus on other areas of concern to women, such as pregnancy discrimination, employment issues, discrimination against women in the military, sexual harassment and exploitation, lesbian and gay rights, civil rights, sex discrimination in insurance, and ending violence against women.

National Partnership for Women and Families

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance women's health and equal employment opportunities through several means,

including by challenging discriminatory employment practices in the courts.

National Women's Health Network

The National Women's Health Network (NWHN) works to improve the health of all women by influencing policy and supporting informed consumer decision-making. The NWHN is committed to ensuring that women have self-determination in all aspects of their reproductive and sexual health, including having full access to safe and affordable abortion care. We believe that the government has an obligation to safeguard the health of all people and that all women should have access to excellent healthcare. In support of these beliefs, the NWHN defends against threats that undermine access to contraceptive and abortion care and promotes provision of accurate information about reproductive health.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization that has worked since 1972 to advance and protect women's legal rights and opportunities. The fundamental right to abortion recognized in *Roe* v. *Wade* is of profound importance to the lives, health, and futures of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to a safe abortion without harassment, violence, or other interference, and has filed or participated in numerous amicus briefs in this Court in cases that affect this right.

Nursing Students for Choice

Nursing Students for Choice (NSFC) is a national nonprofit organization comprised of nursing students and practicing nurses across the United States. Nurses are vital clinicians in reproductive healthcare, who provide much of the pregnancy testing, birth control and options counseling, and post procedure care that affects patients every day. With more than 3 million nurses working in the US today, we counsel patients both formally and informally—in emergency rooms, health departments, federal and private offices, and on campuses across the country. We believe that both patients and clinicians can, and will, benefit from buffer zones which decrease the level of harassment for all who are providing care, as well as for those who are being provided for.

Physicians for Reproductive Health.

Physicians for Reproductive Health (PRH) is a doctor-led national nonprofit organization that relies upon evidence-based medicine to promote sound reproductive healthcare policies. Comprised of physicians, PRH brings medical expertise to discussions of public policy on issues affecting reproductive healthcare and advocates for the provision of comprehensive reproductive health services as part of mainstream medical care. Doctors in PRH's network have experienced violence and harassment and PRH recognizes the need for measures such as buffer zones that help ensure the safety of healthcare providers and the patients for whom they care.

Provide, Inc.

Provide, Inc. is a nonprofit organization based in Massachusetts and founded in 1992. Provide is committed to access to safe abortion for all women in the U.S. Provide believes all people should be able to obtain needed health care including abortion. Provide works in Southern and Midwestern states to train and social service providers to offer non-judgmental, all options counseling to their clients and patients. Provide also works with nursing faculty seeking to address the gaps in reproductive options curricula at nursing programs. Finally, Provide conducts trainings with clinicians that aims to expand women's access to manual vacuum aspiration and medication management of miscarriage. Provide recognizes that the ability to enter into a healthcare facility unobstructed and free of harassment is integral to both the provision of and access to care.

Reproductive Health Access Project

Reproductive Health Access Project (RHAP) is a national nonprofit dedicated to integrating contraception and abortion into primary care. Through training, advocacy and mentoring programs, RHAP helps family physicians and other clinicians make birth control and abortion a part of routine medical care. RHAP is guided by the principle that everyone has the right to access birth control and abortion services in safe, secure settings. We believe that reproductive health choices are highly individual and must be made by individual families in consultation with caregivers for whom the individual's ability to meet their full potential is of paramount importance. We believe that these choices must be supported by healthcare

policies that ensure everyone has fair and equal access to the means to control their reproductive futures. Ensuring the safety of clinicians and staff who provide abortion care as well as the safety of individuals seeking this care is critical.

The Reproductive Health Technologies Project

The Reproductive Health Technologies Project (RHTP) works to advance the ability of every woman to achieve full reproductive freedom with access to the safest, most effective, and preferred methods for controlling her fertility and protecting her health. RHTP's long-term goal is to change the political and commercial climate in the United States so women have access to technologies they want to become pregnant when they are ready, end a pregnancy when they are not, and promote their health and well-being throughout their reproductive lives.

The Unitarian Universalist Association

The Unitarian Universalist Association (UUA) comprises more than 1,000 religious congregations nationwide. Many years ago, the UUA General Assembly passed a resolution urging individuals to ensure that every woman shall have the right to choose to terminate a pregnancy legally and with all possible safeguards.

The Women's Bar Association of Massachusetts

The Women's Bar Association of Massachusetts (WBA) is a professional association comprised of 1,500 attorneys, judges, and policy-makers

dedicated to advancing and protecting the interests of women in society. To fulfill this mission, the WBA has submitted amicus briefs, supported legislation, and provided pro bono representation in the areas of, *inter alia*, domestic violence, alimony, nursing mothers, and reproductive health. Indeed, since its creation in 1978, the WBA has successfully advocated for Massachusetts laws that protect a woman's right to access reproductive healthcare. Specifically, in 2000, the WBA testified before the legislature in support of the Commonwealth's first buffer zone bill. In 2007, the WBA along with the Massachusetts Attorney General, District Attorneys, legislators, and a coalition of other advocacy organizations, worked to pass the buffer zone law that is at issue in this case. Therefore, the WBA has an interest in the outcome of this case, and it represents an appropriate issue for the WBA to offer its guidance.

Appendix B:
NAF Violence and Disruption Statistics
(1977 – 2012)

NAF VIOLENCE AND DISRUPTION STATISTICS

INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS IN THE U.S. & CANADA

VIOLENCE	1977-94	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTAL
Murder[1]	5	0	0	0	2	0	0	0	0	0	0	0	0	0	0	1	0	0	0	8
Attempted Murder	11	1	1	2	1	0	1	0	0	0	0	0	0	0	0	0	0	0	0	17
Bombing[1]	29	1	2	6	1	1	0	1	0	0	0	0	0	0	0	0	0	1	0	42
Arson[1]	124	14	3	8	4	8	2	2	1	3	2	2	0	2	0	0	0	1	5	181
Attempted Bomb/Arson[1]	64	1	4	2	5	1	3	2	0	0	1	6	4	2	1	1	1	1	0	99
Invasion	347	4	0	7	5	3	4	2	1	0	0	0	4	7	6	1	0	0	0	391
Vandalism	585	31	29	105	46	63	56	58	60	48	49	83	72	59	45	40	22	27	12	1490
Trespassing	0	0	0	0	0	193	81	144	163	66	67	633	336	122	148	104	45	69	47	2218
Butyric Acid Attacks	80	0	1	0	19	0	0	0	0	0	0	0	0	0	0	0	0	0	0	100
Anthrax/Bioterrorism Threats	0	0	0	0	12	35	30	554	23	0	1	0	0	1	3	2	1	1	0	663
Assault & Battery	95	2	1	9	4	2	7	2	1	7	8	8	11	12	6	9	4	3	7	198
Death Threats	225	41	13	11	25	13	9	14	3	7	4	10	10	13	2	16	2	2	6	426
Kidnapping	2	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	4
Burglary	34	3	6	6	6	4	5	6	1	9	5	11	30	12	7	12	13	8	5	183
Stalking[2]	200	61	52	67	13	13	17	10	12	3	15	8	6	19	19	1	7	1	6	530
TOTAL	1801	159	112	223	144	336	215	795	265	143	152	761	474	249	237	187	95	114	88	6462

2b

NAF VIOLENCE AND DISRUPTION STATISTICS

INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS IN THE U.S. & CANADA

DISRUPTION	1977-94	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTAL
Hate Mail/Harassing Calls	1833	255	605	2829	915	1646	1011	404	230	432	453	515	548	522	396	1699	404	365	417	15479
Email/Internet Harassment	0	0	0	0	0	0	0	0	24	70	51	77	25	38	44	16	44	17	41	447
Hoax Device/Susp. Package	0	0	0	0	0	0	0	0	41	13	9	16	17	23	24	17	8	2	7	177
Bomb Threats	311	41	13	79	31	39	20	31	7	17	13	11	7	6	13	4	12	1	1	657
Picketing [4]	7768	1356	3932	7518	8402	8727	8478	9969	10241	11348	11640	13415	13505	11113	12503	8388	6347	4780	4519	163949
Obstruction [5]																			79	79
TOTAL	9912	1652	4550	10426	9348	10412	9509	10404	10543	11880	12166	14034	14102	11702	12980	10124	6815	5165	5064	180788
CLINIC BLOCKADES																				
Number of Incidents	634	5	7	25	2	3	4	2	4	10	34	4	13	7	8	1	1	5	6	775
Number of Arrests [3]	33661	54	65	29	16	5	0	0	0	0	0	0	0	3	1	0	0	0	4	33838

All numbers represent incidents reported to or obtained by NAF. Actual incidents are likely much higher. Tabulation of trespassing began in 1999 and tabulation of email harassment and hoax devices began in 2002.

1 Incidents recorded are those classified as such by the appropriate law enforcement agency. Incidents that were ruled inconclusive or accidental are not included.

2 Stalking is defined as the persistent following, threatening, and harassing of an abortion provider, staff member, or patient away from the clinic. Tabulation of stalking incidents began in 1993.

3 The "number of arrests" represents the total number of arrests, not the total number of persons arrested. Many blockaders are arrested multiple times.

4 NAF changed its method of collecting this data in 2011.

5 Tabulation of Obstruction began in 2012. Obstruction is defined as the act of causing a delay or an attempt to cause a delay in the conduct of business or prevent persons from entering or exiting an area. This would apply to violations of the FACE Act.

3b

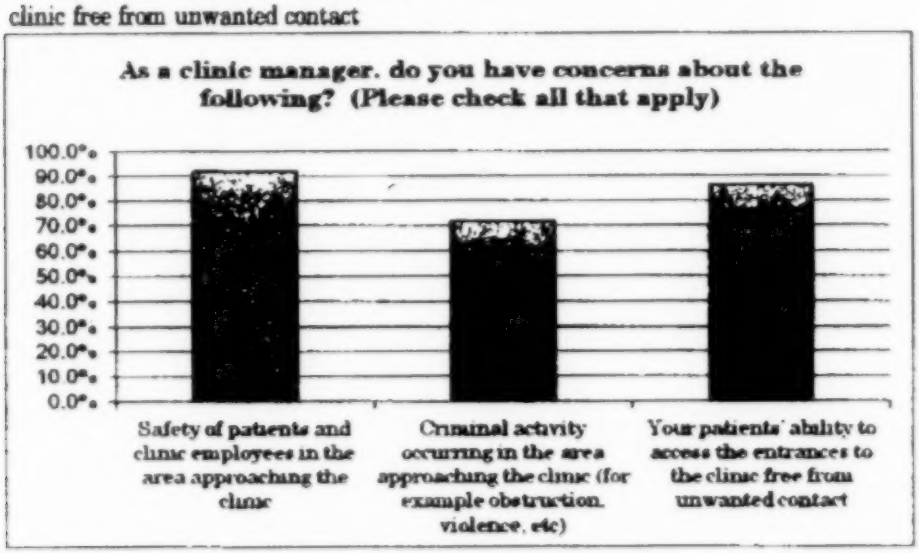
Appendix C:
NAF 2013 Survey

Anti-Abortion Violence and Disruption
Survey Results
September 2013

At the National Abortion Federation, the safety of our members and their patients is our highest priority. Each month, we collect reports from our members in the United States and Canada on the incidents of violence and disruption they have faced during the previous month. Periodically, we conduct surveys of our members on particular areas of concern. These results are from a survey we conducted in September 2013 of our member facilities in the United States. A link to the online survey was sent to each member facility, and 112 facilities responded to the survey.

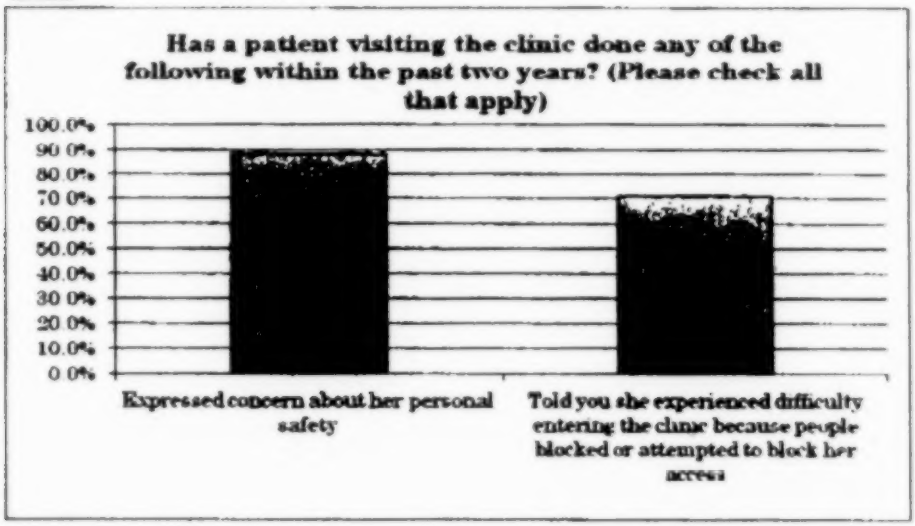
As a clinic manager, do you have concerns about the following? (Please check all that apply)

Answer Options	Response Percent
Safety of patients and clinic employees in the area approaching the clinic	92.1%
Criminal activity occurring in the area approaching the clinic (for example, obstruction, violence, etc.)	71.9%
Your patients' ability to access the entrances to the clinic free from unwanted contact	86.5%



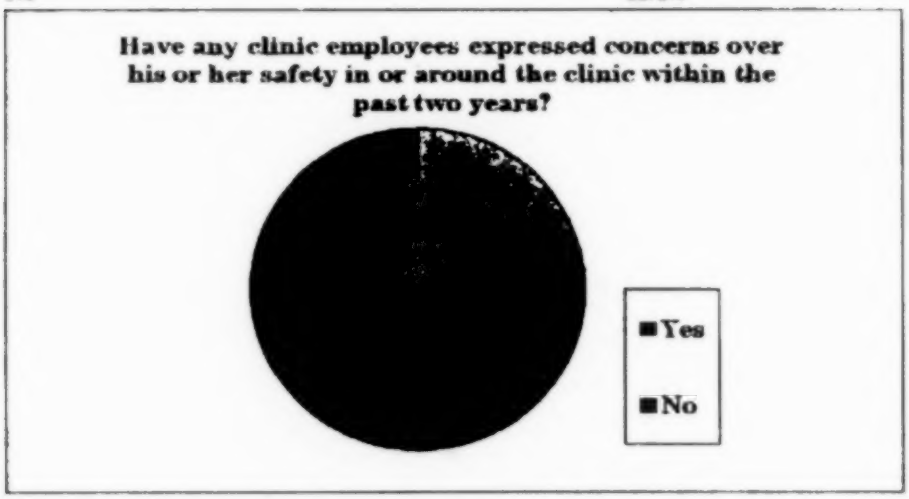
Has a patient visiting the clinic done any of the following within the past two years? (Please check all that apply)

Answer Options	Response Percent
Expressed concern about her personal safety	88.4%
Told you she experienced difficulty entering the clinic because people blocked or attempted to block her access	71.0%



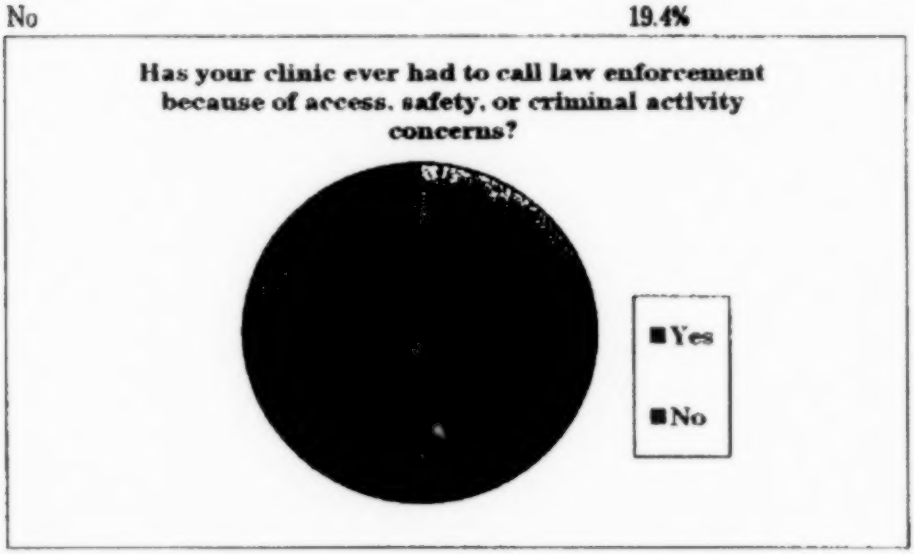
Have any clinic employees expressed concerns over his or her safety in or around the clinic within the past two years?

Answer Options	Response Percent
Yes	56.9%
No	43.1%



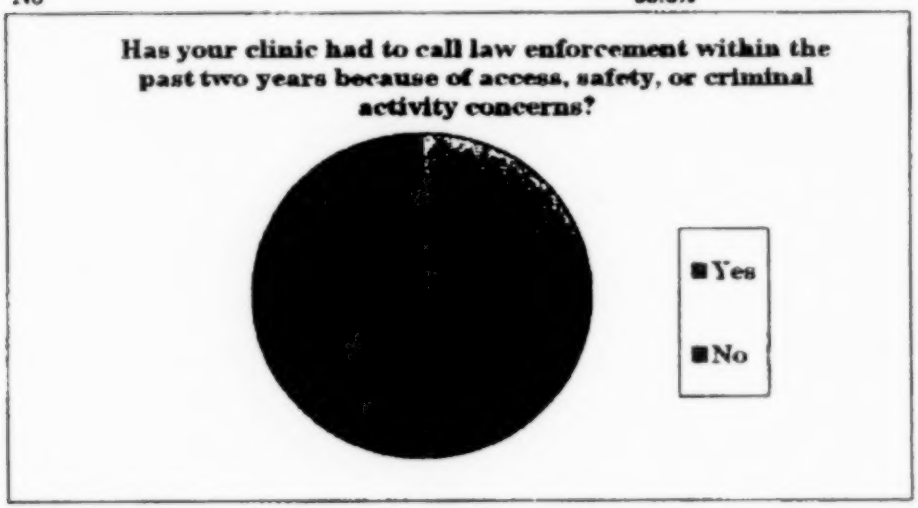
Has your clinic ever had to call law enforcement because of access, safety, or criminal activity concerns?

Answer Options	Response Percent
Yes	80.6%
No	19.4%



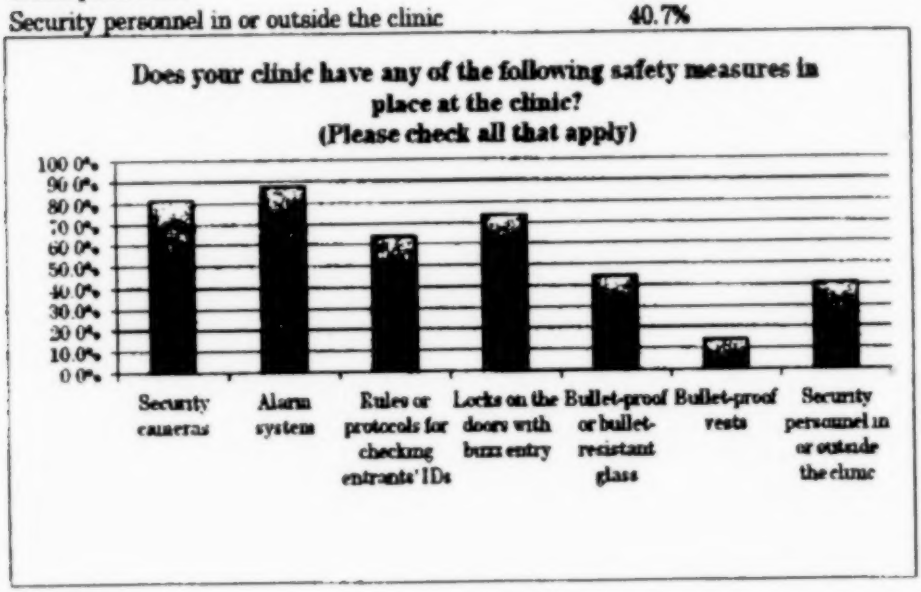
Has your clinic had to call law enforcement within the past two years because of access, safety, or criminal activity concerns?

Answer Options	Response Percent
Yes	66.4%
No	33.6%



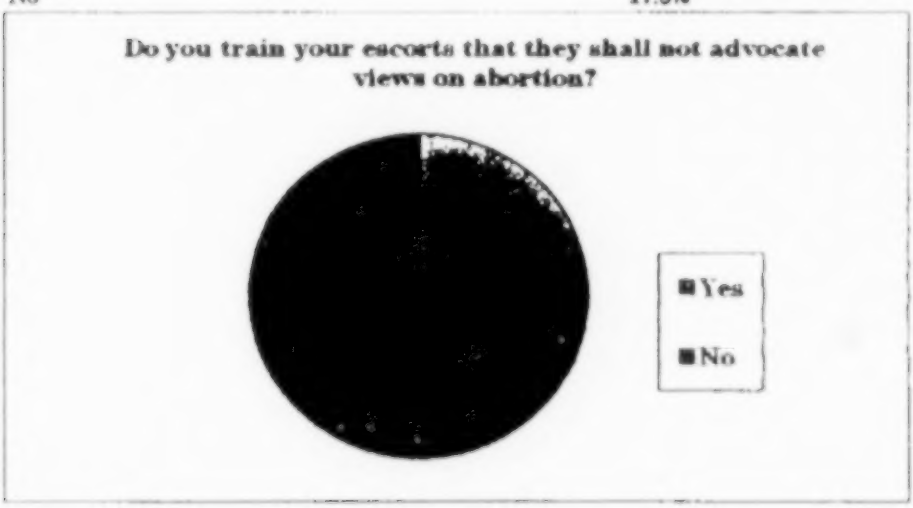
Does your clinic have any of the following safety measures in place at the clinic? (Please check all that apply)

Answer Options	Response Percent
Security cameras	81.5%
Alarm system	88.0%
Rules or protocols for checking entrants' IDs	63.9%
Locks on the doors with buzz entry	74.1%
Bullet-proof or bullet-resistant glass	44.4%
Bullet-proof vests	13.9%
Security personnel in or outside the clinic	40.7%



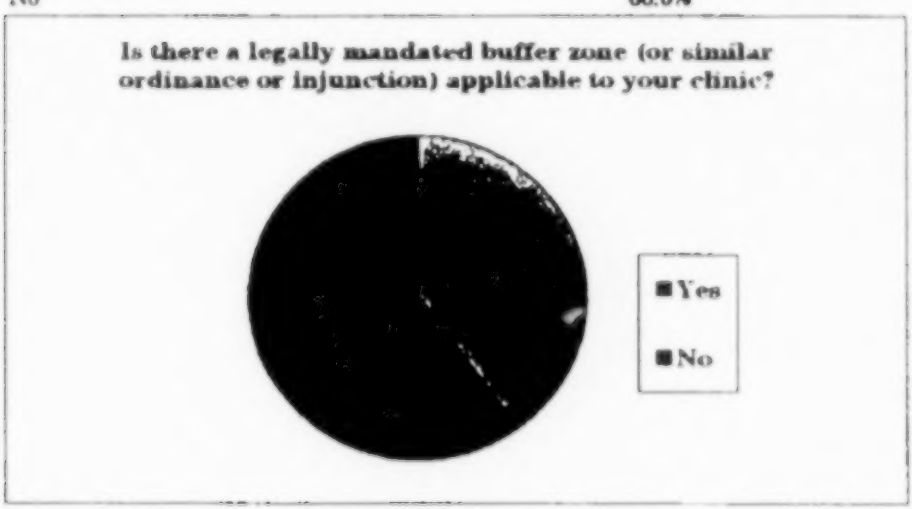
Do you train your escorts that they shall not advocate views on abortion?

Answer Options	Response Percent
Yes	82.1%
No	17.9%



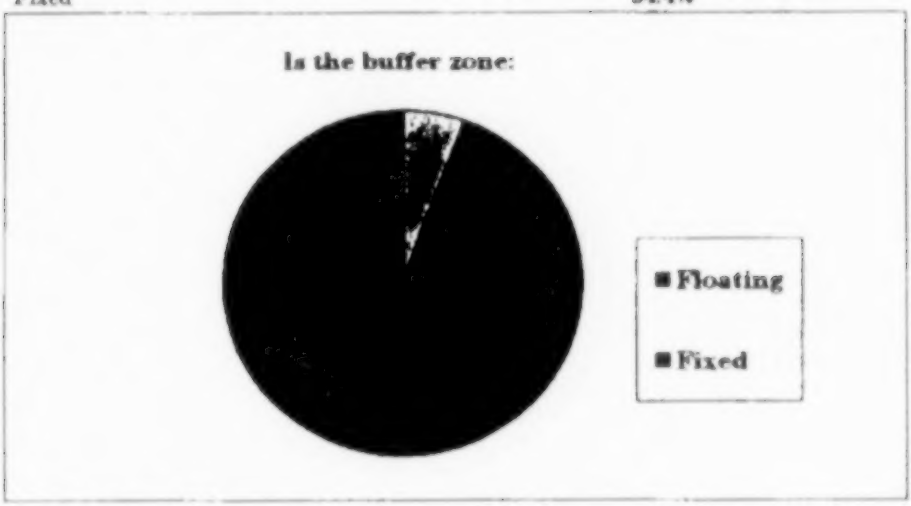
Is there a legally mandated buffer zone (or similar ordinance or injunction) applicable to your clinic?

Answer Options	Response Percent
Yes	40.0%
No	60.0%



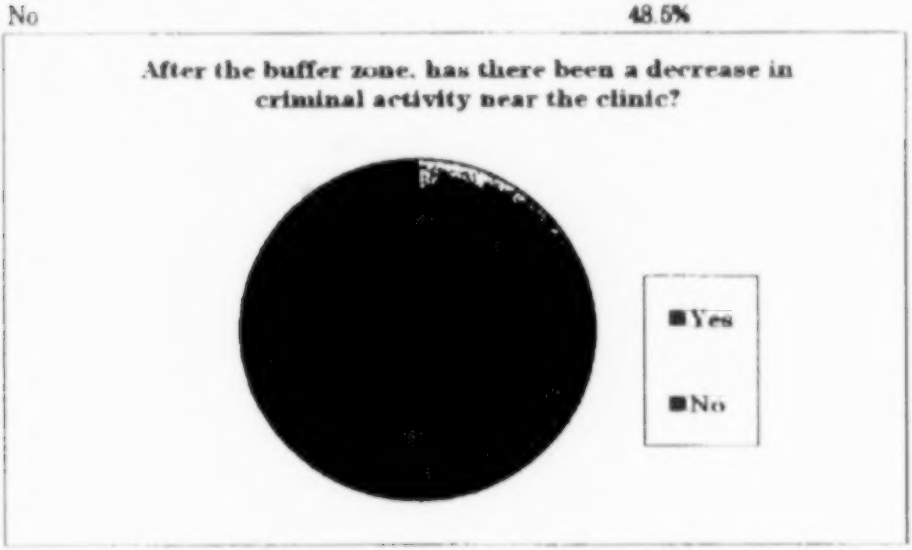
Is the buffer zone:

Answer Options	Response Percent
Floating	5.6%
Fixed	94.4%



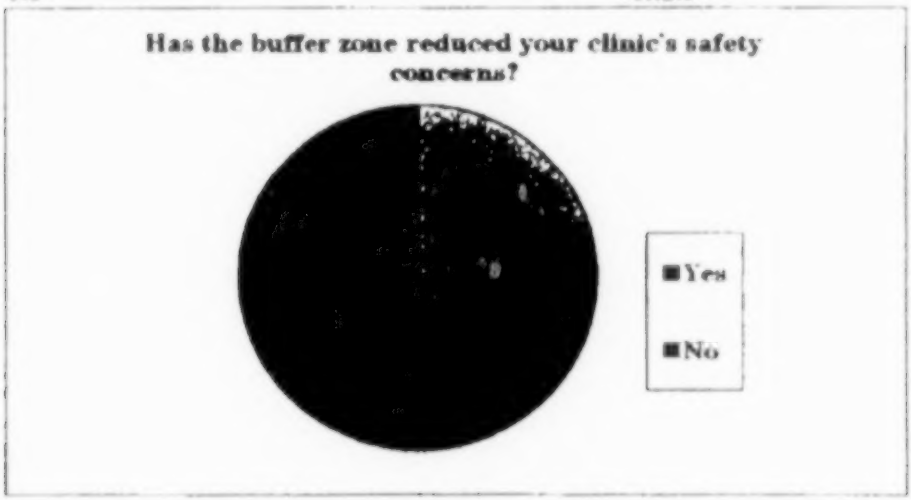
After the buffer zone, has there been a decrease in criminal activity near the clinic?

Answer Options	Response Percent
Yes	51.5%
No	48.5%



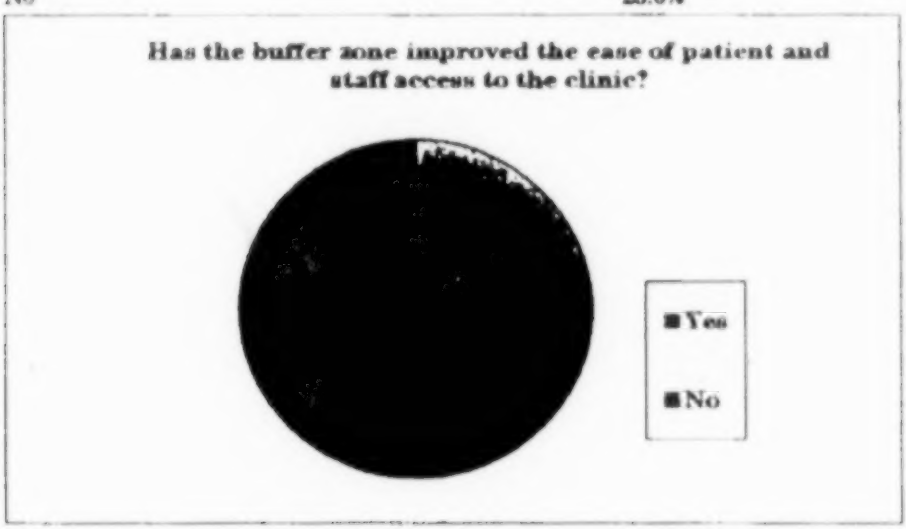
Has the buffer zone reduced your clinic's safety concerns?

Answer Options	Response Percent
Yes	52.8%
No	47.2%



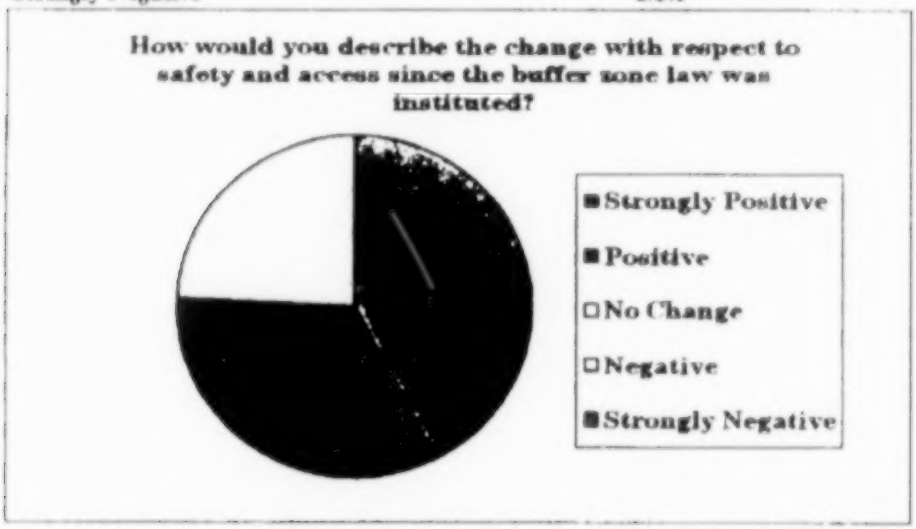
Has the buffer zone improved the ease of patient and staff access to the clinic?

Answer Options	Response Percent
Yes	75.0%
No	25.0%



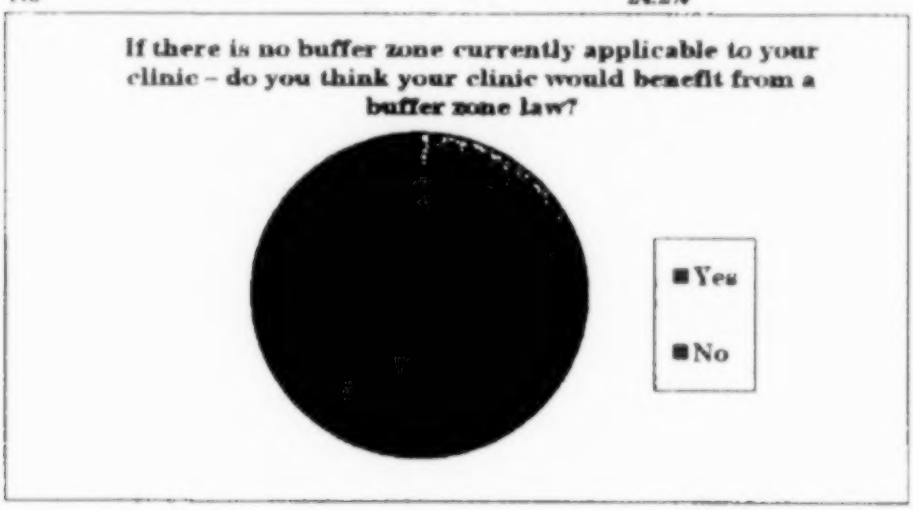
How would you describe the change with respect to safety and access since the buffer zone law was instituted?

Answer Options	Response Percent
Strongly Positive	42.4%
Positive	33.3%
No Change	24.2%
Negative	0.0%
Strongly Negative	0.0%



If there is no buffer zone currently applicable to your clinic - do you think your clinic would benefit from a buffer zone law?

Answer Options	Response Percent
Yes	75.8%
No	24.2%



Appendix D:
Excerpts from Feminist Majority Foundation 2010 National Clinic Violence Survey

2010 NATIONAL CLINIC VIOLENCE SURVEY

Conducted by
FEMINIST MAJORITY FOUNDATION

Eleanor Smeal
President

Katherine Spillar
Executive Vice President

Margie Moore
Law Enforcement Director

Prepared by
Susie Gilligan, Field Director
Lindsay Keating, Research Intern
Nazlin Khorsand, Research Intern

Released September, 2010

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EXECUTIVE SUMMARY

Almost immediately following the November 2008 elections, women's health clinics began reporting increased incidents of hostile threats and activity. Then again, after the murder of Dr. George Tiller by an anti-abortion extremist in May 2009, reports of threats against abortion providers increased. The data in this nationwide survey of women's health clinics – the first comprehensive survey since the summer of 2008 – bear out these observations.

Overall, the percentage of clinics experiencing severe violence[1] has increased to 23.5% of all abortion providers participating in the survey in 2010, compared to 20% in 2008 and 18.5% in 2005. Moreover, this marked the highest level of violence recorded since 1997 when 25.0% of all clinics experienced one or more incidents of severe violence.

Not only did the incidence of severe violence increase, but the violence became more highly concentrated. While a larger percentage of clinics reported "no violence" or only moderate violence, the percentage of clinics reporting three or more incidents of severe violence and harassment rose significantly in 2010 to 11.2% of all clinics compared to 9% in 2008—an increase of nearly one-third. Thus, while a majority of clinics reported no violence, a smaller number reported numerous acts of violence and harassment, with one clinic reporting a total of 11 incidents in 2010 alone.

Moreover, the types of violence shifted to more intensive targeting of doctors and clinic personnel and staff: the incidence of stalking reported by clinics grew from 4% in 2008 to 6.4% in 2010 and the percentage of clinics reporting pamphlets targeting staff increased from 16.1% in 2008 to 19% in 2010. Anti-abortion extremists clearly aim to create a climate of terror to intimidate and drive out abortion providers. Indeed, the data demonstrates a strong correlation between the incidence of violence and harassment and staff resignations: clinics with high violence are more than twice as likely to have a staff member resign.

For targeted clinics, effective law enforcement is essential in preventing incidents of violence. Clinics which rated their experience with local law enforcement as "poor" were twice as likely to experience high levels of violence in 2010 as clinics rating their experience as "good" or "excellent." Disturbingly, however, although the percentage of clinics reporting FACE violations increased in 2010, the number of clinics reporting that investigations were opened into those FACE violations decreased dramatically.

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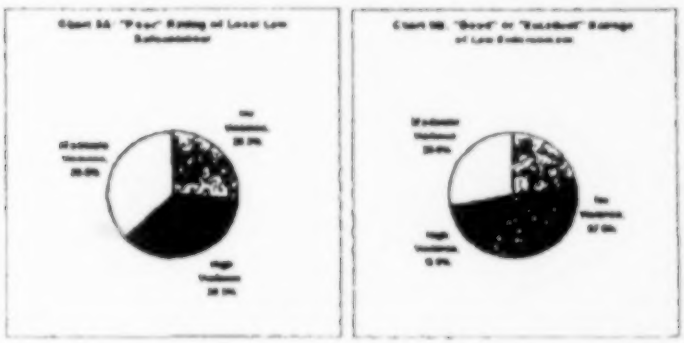
[1] This longitudinal measure of severe violence includes eleven tactics: vandalism, invasions, arson, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats, and arson threats.

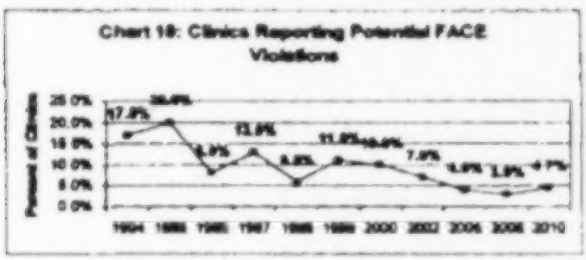
LAW ENFORCEMENT

A strong, positive relationship with law enforcement continues to be crucial for abortion clinics threatened by violence and harassment. Clinics which rated their experience with local law enforcement as "poor" were twice as likely to experience high levels of violence in 2010 as clinics rating their experience as "good" or "excellent." This strong correlation is demonstrated in Chart 9.



Of those clinics in contact with state law enforcement, 54.7% rated the experience "good" or "excellent" and 55.9% of clinics with federal law enforcement contact rated the experience as "good" or "excellent."

In 2010, for the first time since 1999, the percentage of clinics reporting potential FACE violations to federal law enforcement authorities increased. Some 4.7% of clinics reported a potential violation in 2010. However, of the reported violations, only 35.3% resulted in the opening of an investigation, a decrease from 56% in 2008.



Appendix E:
Excerpts from Feminist Majority Foundation 1999 National Clinic Violence Survey

1999 NATIONAL CLINIC VIOLENCE SURVEY REPORT

Conducted by the Feminist Majority Foundation

Prepared by:
Tracy Sell, PhDc
Amy Hennessy, BA
Elizabeth Gevrilles, MFA
Jennifer Jackman, Phd

Released January 19, 2000

KEY FINDINGS

One in five clinics experienced severe anti-abortion violence in 1999. The percentage of clinics reporting one or more types of severe anti-abortion violence (including death threats, stalking, bombings, arsons, blockades, invasions, chemical attacks, bomb threats, and arson threats) declined slightly from 22% in 1998 to 20% in 1999.

Fewer clinics were free from violence in 1999, reversing a trend from previous years. Anti-abortion violence and harassment appears more widely distributed, as the percentage of clinics reporting no violence, vandalism, or harassment has declined from 64% in 1998 to 54% in 1999. For the first time, the gap between the percentage of clinics experiencing no violence and those facing moderate violence has narrowed. **Moreover, the percentage of clinics experiencing high levels of concentrated anti-abortion violence is relatively unchanged at 5% in 1999 compared with 4% in 1998.**

Vandalism at clinics has more than doubled; bomb threats are slightly up. A major increase in vandalism is detected. Over one-third of clinics (34%) reported one or more forms of vandalism, a figure more than doubled from 16% in 1998. In 1999, 13% of clinics were the target of bomb threats, which is a small increase from 11% in 1998.

Measured in this survey for the first time, 18% of clinics report harassment via the Internet or Web. Abortion clinic providers are open targets in cyberspace. With ever-increasing access to computer technology, clinic staff, providers, and patients have become vulnerable to this form of harassment, which may include divulging personal information such as home address and phone numbers, or advocating the targeting of specific abortion providers.

Anthrax threat attacks were prevalent in 1999, with 11% of clinics affected. Clinics in every region of the country have been subjected to these disruptive threats (newly measured in the 1999 National Clinic Violence Survey), all of which have thus far proved to be hoaxes. Additionally, in early January 2000 alone, over thirty clinics in twenty-two states have also received anthrax threats.

All levels of law enforcement received higher "excellent" ratings in 1999, with local law enforcement yielding the largest net increase. This year, 52% of clinics rated local law enforcement as excellent, up 15% from 1998. Federal law enforcement excellent ratings increased from 21% to 35%, a 14% increase. Excellent ratings for state law enforcement also went up, rising 8% in 1999 to 20%. In addition, clinics reported much stronger enforcement of buffer zones and injunctions. The percentage of clinics that identified "strong" enforcement of their buffer zones nearly tripled from 14% to 38% in 1999.

Lower levels of violence are again associated with higher law enforcement response ratings. For example, of those clinics that rated local law enforcement response as "excellent," only 16% experienced high violence. Conversely, one-third of clinics rating local law enforcement poorly were subjected to high levels of anti-abortion violence.

METHODOLOGY

The seventh annual National Clinic Violence Survey measured anti-abortion violence and harassment over the past twelve months. The survey is one of the most comprehensive studies of anti-abortion violence and harassment directed at clinics, patients, health care workers and volunteers in the United States and includes abortion providers of various organizational affiliations as well as independent clinics. In September 1999, surveys were mailed to 839 clinics in the United States. The universe of clinics was compiled by the Feminist Majority Foundation's National Clinic Access Project. Follow-up telephone and fax contacts were made from mid-October to December. Three hundred and sixty abortion providers responded, yielding a response rate of 43%.[2] Participants in this survey were assured that their individual responses would remain confidential.

PROFILE OF RESPONDENTS

This sample of 360 clinics includes clinics and private doctors' offices in 47 states and the District of Columbia. (See Appendix A for a list of respondents by state.) Types of facilities in this sample included non-profit (41%), for-profit (36%) and doctor's offices (23%).

While 62% of the clinics were affiliated with Planned Parenthood and/or the National Abortion Federation, the remaining 38% were unaffiliated with either organization. The majority of facilities are free-standing (64%) and have uncovered parking lots (64%). On-site, volunteer clinic escorts assist patients at 29% of all reporting facilities.

The percentage of clinics' practices devoted to abortion services ranges from 10% or less (23% of all clinics) to over 76% (45% of all clinics). Virtually all facilities (99%) offer a variety of other women's reproductive health care services. These include birth control services (98%), pregnancy counseling (90%), emergency contraception (84%), adoption counseling and referral (67%), cancer screening (67%), and HIV/AIDS testing (60%).

Methotrexate, a method of early medical abortion, is administered at 27% of

responding clinics. Also, clinics' interest in offering mifepristone (formerly known as RU-486) once it becomes available in the United States continues to grow (up 3% to 68% in 1999). Consistent with previous reports, non-profit clinics are most enthusiastic about offering mifepristone (75%).

RESULTS

abortion violent tactics from 1999 to 1998, clinics report that the frequency of threatened anthrax attacks increased 13%, much more than all other tactics

Clinics who receive threatened anthrax attacks are subjected to extensive evacuation, testing, and safety procedures. Such attacks are also disruptive to the larger community, evidenced in a recent anthrax threat at a Toledo OH abortion clinic where law enforcement officials closed a ten-block area. Although the FBI reports that a spate of letters received in 1999 contained only a sticky substance or dark powder, clinic staff and abortion providers are nonetheless disrupted by the necessary evacuation, decontamination, and testing procedures.

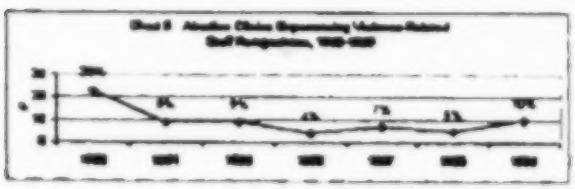
In the first two weeks of January 2000, over thirty clinics in twenty-two states have also received anthrax threats. [illegible] Investigations are ongoing.

FOLLOWING A VIOLENT 1998, MORE STAFF RESIGNATIONS REPORTED

Overall, Clinic *Staff and Administrators Prove Resilient to Campaign of Violence*

The percentage of clinics reporting staff resignations as a result of anti-abortion violence increased. Following a violent 1998, with a fatal clinic bombing in Birmingham AL and the murder of Dr. Barnett A. Slepian in his Amherst NY home, **18% of clinics reported staff resignations due to anti-abortion violence, an increase from 8% of clinics in 1998.** Of those few clinics reporting violence-related resignations, 32% lost a physician, 29% lost a receptionist, 28% lost a lab technician, 23% lost a counselor, and 20% lost a nurse. Clinic administrators proved most resilient, with only 8% resigning.

These resignations can be understood in the broad context of severe clinic violence and persistent harassment. Indeed, the longitudinal trend displayed below (Chart 5) reflects increases in staff resignations that correspond with horrific acts of violence like the murders of doctors, clinic staff, and volunteers in 1993 and 1994.



Within the overall picture, as well, is a strong relationship between violence-related staff resignations and the level of violence at a given clinic. **In 1999, 22% of clinics experiencing high violence lost staff members; in fact, twice as many clinics experiencing high violence lost staff compared with clinics not subjected to high violence.** In the wake of a year that saw a fatal clinic bombing and a physician murdered in his own home, staff vulnerability at "high violence" clinics, while intuitive, is disturbing.

REMEDIES TO VIOLENCE: BUFFER ZONES AND OTHER LEGAL PROTECTIONS

More clinics were protected by buffer zones in this year's reporting period, nearly one-third (114 clinics, 32%) compared with 27% of clinics in 1998. Buffer zones are areas determined by courts, legislatures, or municipal officials in which distance is specified between demonstrators and their intended targets. Buffer zones may apply to clinic facilities as well as staff members' homes. The

year, ten clinics reported home buffer zones for staff members or physicians, compared with 1998, when only five clinics reported such protections.

More clinics conferred positive law enforcement ratings for their buffer zones and injunctions in 1999 than in 1998. A significant portion of clinics (36%) reported that their buffer zones and injunctions were strongly enforced. This finding is dramatically higher than 1998, when buffer zones were strongly enforced at only 14% of clinics and injunctions strongly enforced at 11% of clinics.

Clinics' perceptions of stronger buffer zone and injunction enforcement are also reflected in lowered "poor" ratings. Fewer clinics in this reporting period reported weak or no enforcement of buffer zones and injunctions compared to 1998. In 1999, 23% of clinics rated their legal protections as weakly or not enforced. In 1998, buffer zones were weakly or not enforced at 28% of clinics, and injunctions weakly or not enforced at 36% of clinics.

Nine percent (9%) of clinics turned to the legal system for legal remedies other than buffer zones, consistent with 10% of clinics seeking legal remedies in 1998. Temporary restraining orders and permanent injunctions were the most frequently sought remedies, with eighteen (5%) and fourteen clinics (4%) seeking such measures respectively.

Nearly half of those clinics with buffer zones or injunctions (48%) believe that these legal protections have prompted improved law enforcement responses to anti-abortion violence and harassment at their facilities.

In addition to legal remedies sought, legal victories in this reporting period were also analyzed. Thirteen clinics won temporary restraining orders (4%), five won preliminary injunctions (1%), and nine won permanent injunctions (3%). Twenty-nine clinics (8%) were awarded money damages as a result of anti-abortion activities, though less than one in five of those clinics (17%) have yet to collect monies owed to them.[12]

Even though, for the most part, clinics have not been able to collect judgments, they have not given up and are still pursuing anti-abortion extremists. At the end of

1999, four of the twelve anti-abortion defendants in the high-profile *Planned Parenthood v. ACLA* filed for bankruptcy just prior to their federal court-ordered depositions in an effort to avoid disclosing financial information in the post-judgment phase of the lower court proceeding. Increasingly, anti-abortion extremists are using bankruptcy filings in an effort to avoid paying damage awards.

MORE CLINICS REPORT POTENTIAL FACE VIOLATIONS; LAW ENFORCEMENT FOLLOW-UP DECLINES

Thirty-nine clinics (11%) contacted law enforcement officials to report potential violations of FACE. These numbers have essentially doubled from the 20 clinics contacting law enforcement regarding potential FACE violations in 1998 (Chart 6). Although the number of clinics making FACE-related law enforcement contacts has increased, clinics report that the handling of such contacts by law enforcement officials has declined.

Several indices of authorities' responses to FACE complaints suggest that more aggressive investigations and prosecutions are necessary. Of those clinics initiating contact with officials, the majority (56%) did not receive clear direction for pursuing their complaints. This is an increase from 1998, when 55% of clinics did not receive clear directions from officials. Fifteen percent (15%) of clinics were advised that authorities would not prosecute their cases, a slight increase from

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court, U.S.
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In The
Supreme Court of the United States

ELEANOR McCULLEN, *et al.*,

Petitioners,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AMERICAN BIBLE SOCIETY, CHRISTIAN MEDICAL ASSOCIATION, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, LUTHERAN CHURCH – MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

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INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian beliefs.

The **National Hispanic Christian Leadership Conference**, The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any party, party's counsel, person or entity, other than *amici curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk.

The **International Society for Krishna Consciousness** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. The members of ISKCON adhere to the principles of Gaudiya Vaishnavism, or Krishna Consciousness, which requires followers to regularly venture into public places to distribute religious literature, solicit funds to support the religion, and encourage members of the public to participate in Krishna Consciousness. Bound by this religious duty, known in the Sanskrit language as *sankirtan*, Krishna followers regularly seek access to public places where the largest numbers of people can be found, where government regulations often complicate their ability to engage in *sankirtan*.

The **United States Conference of Catholic Bishops** ("USCCB") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, and the sanctity of human life. Pro-life demonstrators and sidewalk counselors who speak to women considering an abortion seek to encourage a different choice because they believe doing so protects the life of the unborn and prevents adverse consequences to the woman

herself. Such speech is not harmful and, indeed, advances an important government interest in ensuring that a woman's decision will be informed.

Headquartered in Manhattan, the 196-year-old **American Bible Society** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. One of the nation's oldest nonprofit organizations and partnering with hundreds of churches and ministries, today's American Bible Society provides interactive, high- and low-tech resources enabling first-time readers and seasoned theologians alike to engage with the best-selling book of all time. Many of its partners may choose to communicate their messages in traditional public forums and, therefore, the Society has a strong interest in preserving First Amendment rights to speech in such forums.

Christian Medical Association ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 16,000, CMA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for

the poor and needy from their commitment to practicing according to faith-based moral standards.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith. The constitutionally-protected right of speech, especially speech that is not popular, is of paramount concern for those who hold religious convictions about the sanctity of all human life, born and unborn.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

InterVarsity Christian Fellowship/USA ("InterVarsity") is a Christian campus ministry that establishes and advances witnessing communities of students and faculty. InterVarsity ministers to students and faculty through small group Bible studies, large gatherings on campus, leadership training, thoughtful discipleship, and conferences and events. InterVarsity ministers to 36,675 students annually on hundreds of campuses nationwide. InterVarsity is committed to public evangelism and opposes any attempt to erode or limit peaceable assembly or impose limitations on public speech that is not viewpoint neutral.

The **Lutheran Church – Missouri Synod** ("LCMS"), is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the LCMS has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. Two seminaries and nine colleges and universities operate under the auspices of the LCMS, and its member congregations operate the largest Protestant parochial school system in America. The LCMS cherishes all religious liberties, including the rights of free speech and assembly guaranteed under the First Amendment to the United States Constitution, and it is committed to supporting the protection of those rights.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries

in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

SUMMARY OF ARGUMENT

The Massachusetts statute in this case impermissibly abridges constitutionally protected speech and expression, and this Court should reverse the lower court's decision concluding otherwise. This case also presents an opportunity for the Court to reconsider its decision in *Hill v. Colorado*, 530 U.S. 703 (2000). Because *Hill* stands in deep tension with longstanding First Amendment values and is an outlier in this Court's jurisprudence, the case should be overruled. Indeed, *Hill*'s guidance is so confusing that the Court should use this opportunity to overrule *Hill* even if doing so is not strictly necessary to invalidate the Massachusetts statute.

This brief makes two arguments as to why both the Massachusetts statute and *Hill* offend the First Amendment. First, both violate the core of the public forum doctrine that is rooted in the right of assembly.

Second, both conflict with the balance of this Court's free speech jurisprudence, which recognizes the protections of the First Amendment for even emotionally charged expression directed toward unwilling listeners – protections that unquestionably extend to the peaceful expressive activity in *Hill* and by the petitioners in this case.

ARGUMENT

I. The Massachusetts Statute and *Hill v. Colorado* Violate the Core of the Public Forum Doctrine That Is Rooted in the Right of Assembly.

The iconic image of a sidewalk protest epitomizes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That commitment is undermined by the Massachusetts statute, which indefinitely closes a public sidewalk to peaceful expressive activity in the absence of any exigent circumstances. A similar problem plagues this Court's precedent in *Hill*. As Justice Kennedy explained in his dissent, *Hill* leaves unprotected core political expression conducted "in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting).

Hill's analysis charts a course for government manipulation of the public forum to suppress

unwanted expression. It exalts form over substance. As Laurence Tribe has observed, *Hill* is "slam-dunk simple and slam-dunk wrong." Laurence Tribe, *quoted in Colloquium, Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001). *See also* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."). Justice Kennedy noted that *Hill* "contradicts more than a half century of well-established First Amendment principles." *Id.* In fact, the principles that *Hill* contradicts extend much earlier, to the genesis of the First Amendment.

One of the most famous precursors to the sidewalk protest involved the arrest and trial of William Penn. On August 14, 1670, Penn was arrested after delivering a sermon to Quakers gathered on Gracechurch Street in London. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55 (1965). After one of the most celebrated trials in history, a jury acquitted Penn and another Quaker of the charge that their public worship constituted an unlawful assembly. *Id.* at 59.

News of Penn's story was not contained to London – it played a pivotal role during the framing of the First Amendment. During the House debates over the language of the Bill of Rights, Theodore Sedgwick of Massachusetts criticized the proposed right of

assembly as redundant in light of the freedom of speech: "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae." *Annals of Congress*, vol. 1 (1790), 759 (Statement of Representative Sedgwick). John Page of Virginia responded with an oblique reference to Penn's trial that reminded his colleagues of the real threat to liberty which the right of assembly holds at bay. *Id.* (Statement of Representative Page). Historian Irving Brant notes that "the mere reference to it was equivalent to half an hour of oratory." Brant, *supra*, at 55. After Page spoke, the House defeated Sedgwick's motion to strike assembly from the draft amendment by a "considerable majority." *Annals of Congress*, vol. 1 (1790), 761. On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted "the right of the people peaceably to assemble." U.S. Const. amend. I.[2]

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[2] The right of assembly is a stand-alone right not wedded to the separate petition right. *See generally* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 21-25 (2012) (tracing textual history). We know this in part from Congressman Page's reference during the House debates: "Penn's gathering had nothing to do with petition; it was an act of religious worship." *Id.* at 25. This Court has on one occasion suggested otherwise. *See Presser v. Illinois*, 116 U.S. 252, 267 (1886) (indicating that the First Amendment protects the right of assembly only if "the purpose of the assembly was to petition the

(Continued on following page)

William Penn's legacy attests to longstanding connections between religion and assembly in public places – connections that extend to the religious petitioners in *Hill* and in the present case. The persistent witness of religious groups in public places has contributed significantly to our nation's civic vitality. Some of that witness is reflected in the pages of this Court's opinions. *See, e.g., West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Far more is captured in the pages of history. *See, e.g.*, Charles Marsh, *The Beloved Community: How Faith Shapes Social Justice, from the Civil Rights Movement to Today* (2005).

Fifty years ago, Reverend Martin Luther King, Jr., led "the greatest demonstration for freedom in the history of our nation" and delivered his historic words that grounded the Civil Rights Movement in unmistakably religious terms. Martin Luther King, Jr.,

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government for a redress of grievances"); *see also* Inazu, *supra*, at 39-40 (critiquing *Presser*'s interpretation). Scholars have repeated *Presser*'s erroneous interpretation for decades, but this Court has never reinforced it. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to "the *rights* of the people peaceably to assemble and to petition for redress of grievances") (emphasis added); *McDonald v. Chicago*, 130 S. Ct. 3020, 3031 (2010) (referring to "the general 'right of the people peaceably to assemble for lawful purposes'" (*quoting United States v. Cruikshank*, 92 U.S. 542, 551 (1875)); *cf. Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

I Have a Dream (August 28, 1963), *reproduced in* Martin Luther King, Jr., *I Have a Dream: Writings & Speeches That Changed the World* 102 (James M. Washington ed., 1992). The liberty for religious assembly in public places was indispensable to the success of the Civil Rights Movement. As King himself pronounced five years later, in remarks delivered on the eve of his assassination: "If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly." Martin Luther King, Jr., *I See the Promised Land* (April 3, 1968), *reproduced in* King, *supra*, at 197.

While this Court has not delineated the outer limits of the right to peaceable assembly, it has recognized that the core of the right protects peaceful expression on matters of public concern within traditional public forums. In *Hague v. Committee for Industrial Organization*, 307 U.S 496 (1939), Justice Roberts explained that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515 (opinion of Roberts, J.). And as this Court observed a few months after *Hague*, "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it

may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Harry Kalven underscored this theme a generation later: "[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 11-12 (1965).

A line of cases culminating in this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), has shifted the moorings of the public forum doctrine from the Assembly Clause to the Speech Clause. The speech-focused doctrines play a critical role in conserving public forums as spaces for public discussion, debate, and dissent. One of the most important principles arising out of these cases is that "the government may not prohibit all communicative activity" in traditional public forums like streets and sidewalks. *Id.* at 45; *see also United States v. Grace*, 461 U.S. 171, 180 (1983) (invalidating restrictions of expression on public sidewalk near Supreme Court building and holding that government cannot alter traditional public forum status of a sidewalk); *Greer v. Spock*, 424 U.S. 828, 835 (1976) (noting "the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks"). At the same time, more flexible standards for content-neutral

time, place, and manner restrictions acknowledge and accommodate important governmental interests in maintaining order and safety within the public forum. But the speech-oriented aspects of *Perry* and other cases *complement* the original contours of the public forum doctrine; they do *not* replace or obviate them. *Cf. De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").[3]

One problem with shifting the public forum doctrine wholly into a free speech framework is that relying exclusively on the content neutrality inquiry misses the expressive connection between speech and the time, place, and manner in which it occurs. Content-neutral *time* restrictions can sever the link between message and moment. Consider, for example, the consequences for political dissent of a content-neutral time restriction that closed a public forum on symbolic days of the year like September 11th, August 6th (the day the United States detonated an atomic bomb on the city of Hiroshima), or June 28th (the anniversary of the Stonewall Riots). Content-neutral time restrictions that closed the public

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[3] This Court has recognized the right of assembly as "fundamental" and insisted that it "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge*, 299 U.S. at 364. "[I]t is, and always has been, one of the attributes of citizenship under a free government." *Cruikshank*, 92 U.S. at 551.

sidewalks outside of prisons on days of executions, outside of legislative buildings on days of votes, or outside of courthouses on days that decisions are announced, would raise similar concerns. And yet all of these formally satisfy the content neutrality inquiry.

Content-neutral *place* restrictions can be similarly distorting. As Timothy Zick observes, "[s]peakers like abortion clinic sidewalk counselors, petition gatherers, solicitors, and beggars seek the critical expressive benefits of proximity and immediacy that inhere in such places." Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* 21 (2009). Content-neutral restrictions that deny access to places of symbolic significance undermine the expression that depends upon connection to place. *Hill*'s assertion that the Colorado statute was not a regulation of speech but simply "a regulation of the places where some speech may occur," 530 U.S. at 719, misses this fundamental connection: the location of the speech can be indispensable to its message and its efficacy.

Content-neutral *manner* restrictions can drain an expressive message of its emotive content. A ban on singing could weaken the significance of a civil rights march, a funeral procession, or a memorial celebration. Content-neutral manner restrictions can also eliminate certain classes of people from the forum altogether. Imagine, for example, a public forum that required all expression to be conveyed on notarized documents or gold-embossed stationary. *Cf. City*

Council v. Taxpayers for Vincent, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) ("The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless 'essential to the poorly financed causes of little people,' and their prohibition constitutes a total ban on an important medium of communication." (*quoting Martin v. Struthers*, 319 U.S. 141, 146 (1943)).

None of these examples is meant to suggest that time, place, and manner restrictions are always impermissible. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (upholding ban of sound trucks on public streets "amplified to a loud and raucous volume"). But content-neutral restrictions can have debate-altering effects when they exclude or undermine certain forms of expression. As Justice Kennedy has noted, "public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring in the judgment). This "jurisprudence of categories" is one of the fundamental problems with *Hill*, which created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places." Clark LeBlanc & Jamin B. Raskin, *Disfavored Speech About Favored*

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Hill's failure to guarantee meaningful access to all speakers skews the forum in favor of a particular viewpoint. *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (recognizing that the exclusion of religious viewpoints is debate-altering). Under the guise of neutrality, ideological policing of the forum operates like a classic prior restraint – excluding certain perspectives from the forum before their ideas and values are ever able to manifest. That is one way to win a contested cultural argument. But it comes at the cost of violating our commitment to diverse viewpoints in the public forum.

Consider the implications for the present case. The Massachusetts statute provides that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within [specified distances around those facilities]." Mass. Gen. Laws ch. 266, § 120E½(b). The statute exempts from this absolute prohibition only facility patients, facility employees acting within the scope of their employment, law enforcement and other certain government agents acting within the scope of their employment, and "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." *Id.* It therefore criminalizes expressive activity concerning matters of

public concern on public ways and sidewalks near reproductive health facilities.

It is worth underscoring the sheer magnitude of these restrictions. Ordinary citizens are excluded from covered zones unless they are "using the public sidewalk . . . *solely* for the purpose of reaching a destination other than such facility." Mass. Gen. Laws ch. 266, § 120E½(b)(4) (emphasis added).[4] The statute criminalizes any purposeful conversation and *all* public assemblies of two or more people in a covered zone. If Eleanor McCullen approaches a willing listener to discuss abortion in a covered zone, she is subject to three months' imprisonment for a first offense, and two and a half years' imprisonment for each subsequent violation. *Id.* at § 120E½(d) and (e). For that matter, the statute even prevents McCullen from entering a covered zone to sing or pray quietly. These possibilities illustrate the striking dissonance between the First Amendment and the Massachusetts statute that Respondents argue is justified by *Hill*.

If Massachusetts can close off the sidewalks surrounding reproductive health facilities to peaceful expressive activity, then the government can prohibit expression in a wide range of circumstances. A state

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[4] Similarly, facility and government employees lose their privilege to occupy covered zones if they act outside the scope of their employment. Mass. Gen. Laws ch. 266, § 120E½(b)(2)-(3). Thus, the statute criminalizes any expressive purpose outside of the scope of their employment.

might seek to undermine union strikes by closing off public sidewalks surrounding factories to peaceful expressive activity. Or the state might seek to stifle criticism of a controversial legislative policy by excluding peaceful expressive activity from the public sidewalks near the state capitol. A state could offer high-minded justifications for these hypothetical regulations just as Massachusetts has identified justifications for its statute. In the end, however, these regulations fundamentally undermine the public forum.

This is not to say that the state is without any recourse for regulating a traditional public forum. The Assembly Clause protects only *peaceable* assembly. Longstanding First Amendment doctrine allows the state to regulate speech and assembly that cross the threshold of violence – but the state bears the burden of drawing the constitutionally appropriate line. As this Court noted in *De Jonge*:

> [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

299 U.S. at 364-65. *See also Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969) ("Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions

between mere advocacy and incitement to imminent lawless action").[5] There is no allegation in this case or in *Hill* of speech or assembly that was, or would be, violent or disorderly. Instead, *Hill* and the Massachusetts statute enable perpetual bans on the kind of peaceful expressive activity that lies at the core of the First Amendment.

II. The Massachusetts Statute and *Hill* Wrongly Suggest That There Is A Right to Avoid Unpopular Expression in Public Places.

Hill was premised on the novel proposition "that citizens have a right to avoid unpopular speech in a public forum." *Hill*, 530 U.S. at 771 (Kennedy, J., dissenting). The Massachusetts statute rests on similar logic. But this reasoning is at odds with the overwhelming thrust of this Court's free speech jurisprudence, which protects the ability of speakers to communicate to unwilling listeners (absent exceptions not relevant to *Hill* or the instant case). *Id.*

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[5] Limitations on the public forum might also be permissible when they respond to exigent circumstances or are narrowly tailored to ensure free access to public spaces. A municipality might, for example, limit protests on public streets on mornings when street cleaning occurs. Firefighters might disperse even a peaceful assembly if necessary to reach a burning building. And "[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. State of Louisiana*, 379 U.S. 536, 554-55 (1965).

(collecting cases). There is no "right to be let alone" from "public expression in traditional public forums." Zick, *supra*, at 87. As this Court made clear in *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963), "[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."

The peaceful and non-confrontational expression engaged in by the petitioners here falls well within this Court's free speech jurisprudence, which permits even *hurtful* speech, expression, and protest. As the Court observed just two terms ago in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), "[a]s a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*'s words reflect long-standing First Amendment principles:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience,

> annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (internal citations omitted). *See also Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (asserting that speech may not be restricted "because [it] may have an adverse emotional impact on the audience").[6] These commitments are not cost-free, but they are costs that we as a Nation committed to long ago.

CONCLUSION

This Court has noted that "[w]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse, or even contrary, will disintegrate the social organization." *Barnette*, 319 U.S. at 641. Part of our assurance

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[6] Even if our capacity to endure hurtful expression reaches an outer limit, neither the petitioners here nor the petitioners in *Hill* come close to that line. Nothing in the record in either *Hill* or the instant case evidences speech or expression "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting) (citations and quotations omitted). Nor can it be said that the speech and expression of the abortion protestors and sidewalk counselors in these cases form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

of this freedom rests in our shared commitment to peaceable assembly. But *Hill* and the Massachusetts statute go well beyond ensuring peaceability. *Amici* urge this Court to reverse the lower court decision, overrule *Hill*, and restore "the proud tradition of free and open discourse in a public forum." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting).

Respectfully submitted,

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September 16, 2013

AMICUS CURIAE BRIEF

AND
BRIEFS

No. 12-1168

IN THE
Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The *amici curiae* submitting this brief take no position on the controversial subject of abortion. The *amici* include governmental entities and individuals with a wide variety of opinions on the constitutionality and morality of abortions, as well as on the proper limits of the state's ability to regulate abortions. Consistent with the range of views across America, many state and local government office holders and attorneys are adamantly pro-life; many are pro-choice, yet all support the constitutional right of peaceful protest.

What unites these members is their recognition that in some situations—not limited to health care facilities—reasonable regulations are necessary to maintain public safety and to protect access. More fundamentally, *amici* and their members share the concern that if the Supreme Court prohibits fixed buffer zones in this case, state and local governments will no longer be able to use this administrative tool to regulate effectively in response to local conditions, in this context and many others.

SUMMARY OF THE ARGUMENT

State and local governments have an important perspective in this case, and on how its outcome will affect the validity of time/place/manner regulations in a wide variety of contexts. *Amici* and their members regularly use fixed buffer zone laws as a vital tool to protect public safety while preserving First Amendment rights. They are the experts on legislating in response to local conditions, and amending and improving laws which fail to redress an identified problem. When the Commonwealth of Massachusetts found that its original statute, the 18-foot "floating" buffer zone, failed to protect patients on their way into reproductive health care clinics, it enacted a 35-foot "fixed" buffer zone. The revised Act solved the public safety problem without stifling the protesters or their message.

If this Court strikes down the Massachusetts Act, many time/place/manner regulations are at risk of being declared unconstitutional, and the public safety interests behind these regulations will be thwarted, putting citizens at risk of bodily harm. Most regulations of the "place" of speech consist of fixed buffer zones, not fluctuating ones, and many impose a distance of greater than 35 feet, where warranted by the specific circumstances. And if this Court adopts Petitioners' novel arguments, then the three-part time/place/manner test will become unrecognizable and ineffectual.

First, Petitioners' interpretation of content- and viewpoint-neutrality would upend the well-established meaning of those terms. It is not "content-based" to impose place restrictions in response to a specific, observed public safety problem, even if the protesters who have caused that problem share an ideological

position. And it is not "viewpoint-based" to differentiate between persons who work in a targeted facility, and those who come there to protest.

Next, in contrast to Petitioners' claim, the "narrow tailoring" requirement does not prohibit governments from solving public safety problems because there are already laws on the books which have proved ineffective for that purpose. Also, this Court has long recognized that time/place/manner regulations address the cumulative effect of the speech activity regulated, and that their validity cannot be based on whether the Petitioners alone would cause excessive congestion or other harm.

Finally, by definition, speakers who challenge a time/place/manner regulation are dissatisfied with its required distance or assigned area. It is axiomatic that allowing this type of regulation entails restricting speakers from their first-choice method for delivering their message. Here, the Massachusetts Act satisfies this Court's "ample alternatives" standard because all clinic protesters can be seen and heard, and all have the opportunity to capture the attention of their intended audience. There remain many ways of initiating closer conversations, but as courts have recognized in other contexts, time/place/manner regulations are not unconstitutional because speakers are not in immediate proximity to their audience.

In sum, if this Act is struck down, and if Petitioners' arguments are embraced as new standards, state and local governments' ability to protect public safety in a variety of contexts will be greatly diminished.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS' IMPORTANT PERSPECTIVE ON THE WIDE-RANGING IMPACT OF THIS DECISION SHOULD BE CAREFULLY CONSIDERED

As frequently noted by this Court, under our federalist system, the police power to protect citizen's health, safety, and welfare belongs to the states. "[T]he structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985))). States also delegate this power to their subsidiary local governments (municipalities, counties, townships, special districts, and school districts), thus empowering these entities to protect citizens' health, safety, and welfare in response to local conditions. *See generally* DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERALIST SYSTEM 19-29 (7th ed. 2010).

State and local governments need the ability to legislate in response to specific local issues in a wide variety of familiar, recurring contexts. One of these contexts involves the particular conditions at local reproductive health care facilities, and their communities' unique approach to the many legal and political issues posed. Indeed, given the broad range of positions in this national controversy, it is an especially apt context to defer to solutions produced in the "laboratory of the states." *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 42-43 (2005) (citing *Brecht v.*

Abrahamson, 507 U.S. 619, 635 (1993)) (discussing "the role of States as laboratories"); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (originating concept, stating "one of the happy incidents of the federal system" was that a state could "serve as a laboratory . . . and try novel social and economic experiments").

Undoubtedly, it is essential for all levels of government to respect citizens' constitutional rights to freedom of speech, including through verbal protest, leafleting, and signs. But where these protected activities create public safety problems for other citizens, state and local governments must carefully balance the conflicting interests, and then be allowed to use reasonable, content-neutral regulations of the time, place, or manner of such speech.

These familiar principles are increasingly essential in the aftermath of the Great Recession. As described in a recent report by the U.S. Department of Justice,

> In every corner of the United States, state, local, and tribal police departments are being forced to lay off officers and civilian staff, or modify their operations as a result of budget cuts. Over the last 2 years, many agencies have experienced considerable effects from budget constrictions, including mandatory furloughs and hiring freezes, which have resulted in significant reductions in staffing levels never experienced before.

U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (Oct. 2011), *available at* http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Imp

act.pdf) ("Report").[2] Not surprisingly, the corresponding change in the ratio of police to local population has resulted in steep declines in police service and ability to respond to citizen calls. *Id.* at 12-20. Further, the Report concluded that this problem is likely to last for at least the next five to 10 years, and may be a permanent structural change. *Id.* at 34.

But even before these recent troubles, as a practical matter, there are never enough police available to be on the spot to prevent public safety problems or to address each of them as they occur. According to pre-Recession data, municipal and township police departments employed an average of 2.3 full-time officers per 1,000 residents. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, NCJ 233982 (July 2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf. Accordingly, many local governments are on the low end of that average. When police are assigned to remain on site at protests or other situations creating public safety hazards, officers are less available to respond to citizens' crime reports. But where laws provide specific, objective limits on the place for certain speech activities, such clarity goes far toward preventing problems requiring police response. This reality must be taken into account in assessing whether the Massachusetts Act satisfies the applicable constitutional standard.

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[2] Note that some of these cuts were quite dramatic: during 2008-11, Flint, Michigan laid off two-thirds of its police force, and the Camden, New Jersey police force was cut in half in January 2011. *Id.* at 13.

II. THE MASSACHUSSETS ACT DEMONSTRATES HOW STATE AND LOCAL GOVERNMENTS FASHION REGULATIONS TO FIT LOCAL CONDITIONS

State and local governments understand local conditions, issues, and problems. Accordingly, they are the experts on how best to resolve local concerns by balancing important state interests such as public safety with preserving the important constitutional right to freedom of speech.

This case presents an excellent example of how one state experimented with different approaches to solve the problem of protesters interfering with access to clinics and intimidating clinic patients. The first statute Massachusetts enacted (Mass. St. 2000, ch. 217, § 2(b)) (the "2000 Act") was modeled on the law before the Court in *Hill v. Colorado,* 530 U.S. 703, 728 (2000). Like the statute approved in *Hill,* the 2000 Act required protesters to stay six feet away from patients, unless the patient consented to a closer conversation. Speakers were allowed to remain stationary, however, so that it was not a violation if it was the patient who walked within six feet of a speaker. J.A. 124.

Massachusetts' experiment with this law, however, proved completely ineffectual. Protesters simply positioned themselves next to the doors of the clinics, so that an entering patient was forced to pass through a gauntlet of sometimes hostile protesters, many waving graphic signs or pushing literature into their hands. Pet. App. 139-144a. One problem with allowing stationary handbilling is that, in contrast to the consent standard's claimed benefits, it actually allows attempts to reach unwilling listeners. Where a protester positions himself or herself by the entrance

to a clinic, holding signs or leaflets, the spatial intimacy thus created is likely to feel forced upon the patient entering the clinic. J.A. 41, 69. Moreover, the consent standard proved difficult, if not impossible, to enforce. J.A. 50, 60, 67-68. These are the facts observed on the ground by the local officials charged with protecting public safety and access to medical care.

As any legislature should do where a law completely fails to solve an identified problem, the Massachusetts legislature passed an amendment to the 2000 Act in 2007 (Mass. G.L. ch. 266, § 120E1/2(b)) (as amended, "the Act" or "the Massachusetts Act"). The revised Act prohibits protesters from coming closer than 35 feet from the clinics. This allows patients safe and unobstructed access to the clinics, while preserving the protesters' ability to be seen and heard by entering patients.

Massachusetts' fine-tuning of its statute has been successful. Protesters still are able to communicate with patients, while patients have some breathing space as they seek medical care. J.A. 125-28. The First Circuit correctly held that the Act is a reasonable, content-neutral limit on the location of speech, and thus satisfies the First Amendment. As shown next in Part III, the First Circuit's analysis is consistent with many other decisions upholding time/place/manner regulations in numerous other contexts.

III. COURTS REGULARLY UPHOLD VIRTUALLY IDENTICAL PLACE RESTRICTIONS ON SPEECH IN MANY OTHER CONTEXTS, AND THIS CASE PLACES AT RISK ALL OF THESE WELL-ESTABLISHED LAWS

If the Massachusetts Act is found unconstitutional, many important and reasonable regulations will be challenged, and state and local governments are likely to lose an important tool for preventing harm. Petitioners maintain that a 35-foot "fixed" buffer zone is unconstitutional – but that sort of rule has long been upheld by many courts in an extensive array of situations. In Petitioners' view, protesters must be allowed to get closer to their intended audiences, and any distance restriction must be structured as a "floating" buffer zone, which allows protesters to stay close as a clinic patient moves, and which dissolves if protesters interpret the patient as consenting to a close-up conversation. But state and local governments much more commonly use fixed buffer zones (and not floating ones) to protect public safety, and they sometimes determine that local conditions require buffers of greater than 35 feet. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1133-35 (9th Cir. 2005). Over the years, countless courts have held such rules constitutional.

As important background, this Part provides representative examples of the many kinds of buffer zones that courts regularly uphold. The largest category of cases involves regulations directed at protecting public safety. Most frequently, this involves pedestrian and general traffic congestion, including the effects of crowds on the public's ability to enter and exit buildings safely. A second grouping

involves regulations to protect people in especially vulnerable situations: in their home, when receiving medical care, and while mourning at funerals. The two concerns are combined in the reproductive health care clinic context, so it provides an especially compelling case.[3]

A. Similar Laws Protecting Public Safety, Crowds, and Access Upheld

In many different contexts, lower courts have upheld government regulation of crowds for the purpose of protecting public safety. In the cases discussed below, courts have upheld fixed buffer zones where governments have found them necessary to protect freedom of movement on sidewalks and safe access to building entrances, and to deter the potential for physical harm caused by excessive congestion.

One typical scenario involves congested special events, where protesters want to stand on public sidewalks right near venue doors and interact with patrons as they enter or leave. *See, e.g., Defending Animal Rights Today and Tomorrow v. Washington Sports and Entertainment, LP*, 821 F. Supp. 2d 97 (D.D.C. 2011) (upholding requirement that animal rights group protesters stand 20 feet away from arena exits, given pedestrian congestion when circus ended); *Cuviello v. City of Oakland*, No. C 06–5517 MHP, 2010 WL 3063199 (N.D. Cal. Aug. 3, 2010) (upholding 10-

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[3] Note that in addressing these issues, government regulations use two variations on fixed buffer zones. Some, like the Act at issue here, provide that speakers must remain a specified distance away from their target audience. Other regulations use a functionally similar approach, which is to limit speakers to specifically-designated areas.

foot buffer zone for animal rights protesters outside circus venue).

Other cases at risk involve crowded publicly-sponsored special events held on the public way, where speakers who tend to cause additional congestion are limited to designated areas. *See, e.g., Spingola v. Village of Granville*, No. 00-3957, 2002 WL 1491874 (6th Cir. July 11, 2002) (upholding ordinance that limited public speakers to designated areas during village special events); *Price v. City of Fayetteville, N.C.*, No. 5:13–CV–150–FL, 2013 WL 1751391 (E.D.N.C. Apr. 23, 2013) (upholding rule limiting plaintiff's literature distribution to a nonprofit booth and a nearby public park, given pedestrian congestion on sidewalks in crowded festival).

In addition, many courts have held that speakers who seek to draw crowds on a daily basis, such as street performers, may be subject to more general place regulations. *See, e.g., Horton v. City of St. Augustine*, 272 F.3d 1318, 133-34 (11th Cir. 2001) (upholding ordinance prohibiting street performers from performing in a four-block area within the City's historic area); *Enten v. District of Columbia*, 675 F. Supp. 2d 42 (D.D.C. 2009) (upholding rule limiting street vendors to certain assigned locations and regulating the number of vendors at any one location); *McFarlin v. District of Columbia*, 681 A.2d 440 (D.C. 1996) (upholding rule prohibiting free speech activities in Metro stations within 15 feet of any escalator, stairwell, or fare card machine).

And lower courts have recognized that sometimes state and local governments need to use more expansive location restrictions in the face of large-scale demonstrations presenting immediate public safety problems. *See, e.g., Menotti v. City of Seattle*, 409

F.3d 1113, 1133-35 (9th Cir. 2005) (upholding, in light of significant security issues, buffer zone preventing protesters from entering the several-block area covering the conference and hotel venues used by World Trade Organization delegates); *Tetaz v. D.C.*, 976 A.2d 907 (D.C. App. 2009) (upholding police lines barring anti-war protesters from coming within 100 yards of the Capitol Building, which area included public sidewalks).

A questionnaire distributed by the International Municipal Lawyers Association to its members (the "IMLA Questionnaire")[4] provides more evidence of the ubiquity of these types of public safety regulations. Additional examples include a Kansas City ordinance that prohibits panhandling within 20 feet of an ATM, *see* Kansas City, Missouri Mun. Code § 50-8-5, and a law in Nashua, New Hampshire that describes specific, limited location restrictions on handbill distribution, based on the "unique layout" and heavy public use of City Hall, *see* Nashua, New Hampshire Mun. Code § 231-7.

B. Similar Laws Protecting Those in Vulnerable Situations Upheld

Regulating the location of speech for the purpose of protecting individuals in particularly private and vulnerable situations has been upheld in several settings. This jurisprudence also could be at risk if the

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[4] The IMLA Questionnaire was distributed by email to IMLA members on September 4, 2013 and used the Survey Monkey program. There were insufficient responses to provide data, but it generated both (1) confirmation that the type of regulations described here are common, and (2) some helpful anecdotes that are included in this *amicus* brief. (Copies of questionnaire and responses on file with Counsel of Record.).

Massachusetts Act is held unconstitutional. This Court has recognized, for example, that the government may provide special protections restricting unwanted speech in front of a person's home. *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (upholding ordinance banning anti-abortion protests in front of private residence, targeting doctor who performed abortions, but permitting protests elsewhere in residential neighborhood, even on other parts of the block).

Local governments continue to enact laws responding to this type of individual-targeted residential protesting, including by imposing fixed buffer zones like the one at issue here. *See, e.g., Thorburn v. Austin*, 231 F.3d 1114, 1119-20 (8th Cir. 2000) (upholding ordinance prohibiting focused residential picketing within 50 feet of a targeted dwelling's lot line). In response to the IMLA Questionnaire, members described similar ordinances in Riverside, California, *see* Riverside, California Mun. Code Chap. 9.5 (protesters must stay at least 300 feet from front door of targeted residence) and Concord, North Carolina, *see* Concord, North Carolina Mun. Code § 50-251 (protesters must stay outside of a resident's "safety zone," defined as 50 feet from a targeted private residential lot or on the sidewalk across the street).

This issue is especially relevant here because there is an important parallel between targeted residential protest cases like *Frisby* and the reproductive health clinic context. In both situations, protesters are targeting one specific individual at a time, rather than focusing on reaching the public at large or a group audience sharing certain traits or interests. Any patient who is walking down the sidewalk to enter a

reproductive health clinic is likely to feel intimidated when all the demonstrators gathered in that spot focus their attention and speech on her. The Record shows that in fact this regularly occurred at the Massachusetts clinics. Pet. App. 140a, 143a; *see also* J.A. 12, 14.

In addition, this Court has recognized the special sensitivities of patients who are receiving medical care. *See NLRB v. Baptist Hospital, Inc.*, 442 US. 773 (1979) (allowing hospital to prohibit union solicitation in patient care areas, despite NLRB rule generally prohibiting such bans, due to special nature of hospital setting). For reasons equally applicable to the reproductive health clinic context, the Court explained that hospital patients "often are under emotional strain" and that patients need a "restful" and "helpful" atmosphere. *Hill*, 530 U.S. at 729 (quoting *Baptist Hospital,* 442 U.S. at 783-84 n.12).

Also State and local governments throughout the country have used fixed buffer zones to protect mourners at funerals from hostile interruptions. According to a list compiled by the National Conference of State Legislatures, as of March 4, 2011, 39 states have laws requiring protesters to stand a specified distance (typically 300 feet) away from funerals.[5] These laws were enacted in response to protests by the Westboro Baptist Church, which frequently pickets military funerals, displaying signs such as "Thank God for Dead Soldiers" and "Fags Doom Nations." *See Snyder v. Phelps*, 562 U.S. __, 131 S. Ct. 1207, 1210 (2011). This Court's recent funeral

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[5] NATIONAL CONFERENCE OF STATE LEGISLATURES, FUNERAL PROTEST REGULATION STATUTORY PROVISIONS (Mar. 4, 2011) (on file with Counsel of Record).

protest case held only that the First Amendment shields church members from tort liability for their hurtful speech. *Id.* at 1220. The *Snyder* opinion expressly stated that time, place, and manner restrictions raise very different issues, which the Court "had no occasion to consider." *Id.* at 1218.

Since *Snyder*, the Eighth Circuit has upheld funeral protest laws as content-neutral, reasonable regulations of the time and location of protected speech. *See Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013) (upholding the State of Missouri's statute barring protests within 300 feet of a funeral, during or within one hour before or after); *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc) (upholding City of Manchester's identical ordinance).

The Eighth Circuit reasoned that, like those affected in *Hill* and *Frisby*, mourners are unusually vulnerable, and they too need unimpeded access to the funeral. *Manchester*, 697 F.3d at 692. Moreover, church members remain free to protest at any other location, including just outside the 300-foot fixed buffer zone. *Id.* at 694; *see also Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (upholding similar Ohio statute using same analysis).

C. Similar Laws Protecting Both Public Safety and Vulnerable Persons at Clinics Upheld

Using buffer zones around reproductive health clinics is especially compelling given that both types of state interests are present. Fixed buffer zones have been held constitutional when reviewed by this Court. *See Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997) (upholding that part of an injunction which imposed a fixed 15-foot buffer zone around

clinic); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding an injunction imposing a fixed 36-foot buffer zone around clinic's entrances and driveways).

State and local governments continue to rely on fixed buffer zones around clinics to protect patients as they access medical services, and recent lower court cases have upheld such laws. *Brown v. City of Pittsburgh*, 586 F.3d 263, 281 (3d Cir. 2009) (holding that combination of two buffer zones, one a "floating" 8-foot and the other a fixed 15-foot was not narrowly tailored, and stating that the fixed, 15-foot rule best accomplishes the government's interest in "protecting patient access and preventing harassment"); *Clift v. City of Burlington, Vermont*, 925 F. Supp. 2d 614 (D. Vt. 2013) (upholding a fixed 35-foot buffer zone).

IV. PRECEDENT FROM A WIDE RANGE OF LESS-CONTROVERSIAL CONTEXTS DEMONSTRATES THAT THE MASSACHUSETTS ACT IS A CONSTITUTIONAL "PLACE" REGULATION

Based on how this Court has described and applied the time/place/manner test thus far, the Massachusetts Act easily satisfies its three requirements. As set forth in *Ward v. Rock Against Racism*, "even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions:

> [1] are justified without reference to the content of the regulated speech . . .
> [2] are narrowly tailored to serve a significant governmental interest, and . . .
> [3] leave open ample alternative channels for communication of the information."

491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (brackets added).

As shown below, if Petitioners' views on these requirements prevail, not only will Massachusetts lose its effective statute, many existing time/place/manner laws are likely to be struck down. A doctrine reshaped to Petitioners' model would be of little use to state and local governments.

A. The Act is Content- and Viewpoint-Neutral

1. Regulating in Response to a Specific Problem is not "Content-Based"

As explained by this Court in *Ward*, "the principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech *because of disagreement with the message* it conveys." *Id.* at 791 (emphasis added). The Massachusetts statute was enacted not because of disagreement with the pro-life message, but in response to the harmful impact of the protesters' conduct. Nor is it content-based because it was passed to address problems caused by those particular protesters. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Id.*

In assessing time/place/manner regulations, courts regularly dismiss the claim that a regulation is content-based because it was motivated by the problems caused by one or more speakers with a particular message. For example, if animal rights activists were the only speakers who protested outside of a dog racing track, and they regularly caused unsafe

congestion there, using a fixed buffer zone to protect public safety would not be deemed content-based. *See, e.g., Ross v. Early*, 758 F. Supp. 2d 313, 320-21 (D. Md. 2010) (that the location restriction was motivated in response to the conduct of one ideological group – there, animal rights protesters outside the circus – or had an incidental effect on some speakers more than others, did not make it content-based, so long as the government's purpose was "to confront the undesirable secondary effects of the protests – namely, traffic and pedestrian congestion"); *Spingola v. Village of Granville*, 2002 WL 1491874, at *1 (after a self-described "confrontational Evangelist" drew significant crowds of observers using signs and props, thus creating a traffic congestion problem at a village festival, adopting a generally-applicable festival location restriction in response did not make the law content-based).

Logically, it cannot be that a law is content-based simply because it was enacted to address harms caused by speakers with similar messages. Consider the impact. If this Court were to hold that governments could not respond to a public safety problem unless it was caused by speakers on a range of topics, or by groups espousing different viewpoints on the same issue, then no time/place/manner restriction would stand. Legislatures pass laws in response to observed problems. To do so cannot be deemed to mean that they are targeting the content or views of those whose conduct has created the problem triggering the law.

2. *Exempting Functionally-Distinguishable Categories of Persons is not "Viewpoint-Based"*

Neither does the fact that the Act allows clinic employees and agents to assist patients who are on their way into the clinic for medical treatment make it content-based or viewpoint-discriminatory. Respondents' Brief addresses the main points of Petitioners' arguments on this issue.

But it is worth showing here that in fashioning place limitations on speech for public safety reasons in other contexts, governments frequently allow entry for certain people because of their role; doing so does not make the regulation content- or viewpoint-based. For example, during a NATO conference, the City of Colorado Springs established a security zone where protesters and most other persons were not allowed. Even though the policy allowed some categories of persons (delivery and repair persons, and social guests of residents living in that area) to enter and leave the security zone at will, the Tenth Circuit found the policy content-neutral. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1218 (10th Cir. 2007); *see also Pahls v. Thomas*, 718 F.3d 1210, 1234-35 (10th Cir. 2013) (holding that policy banning demonstration activities within a defined geographic area in advance of a presidential visit that permitted residents, but not demonstrators, to remain within that area did "not call into question the content or viewpoint neutrality of [that] policy"); *Mahoney v. United States Marshals Service*, 454 F. Supp. 2d 21 (D.D.C. 2006) (holding that policy of closing downtown blocks to protesters and other speakers on the day of Red Mass, but allowing the media and attendees to enter, was content- and viewpoint-neutral).

An exar le from the IMLA Questionnaire is helpful here. Tul Oklahoma's ordinance imposing a "quiet zone" around hospitals, schools, and churches makes an exception for loud activities that are conducted by the hospitals, schools, and churches whose quiet is protected by the ordinance. *See* Tulsa, Oklahoma Mun. Code § 1400. Looking at a simple example, a noisy school fair conducted by school employees, shows that this kind of ordinance exemption is content-neutral. It merely reflects the fact that the purpose of the quiet zone – protection of the school's function and those served by it – is not implicated when it is school employees (along with volunteers) who engage in the loud speech.

B. The Act Is Narrowly Tailored

1. Especially Where Other Laws Have Proved Unworkable, State and Local Governments are Allowed and Expected to Create New Solutions

Petitioners assert that the Act burdens substantially more speech than necessary because other laws already prohibit abusive behavior outside of clinics. If true, most time/place/manner restrictions would be invalid. But this Court already has firmly rejected this argument in the context of fixed buffer zones around polling places.

Burson v. Freeman held that a law proscribing campaigning within 100 feet of polling place entrances complied with the First Amendment. 504 U.S. 191, 206-08 (1992). The Court acknowledged that voter "intimidation and interference laws" already were in place, but they had proved inadequate because such laws "deal with only the most blatant and specific attempts" to impede elections. *Id.* at 207. In a clear

parallel to this case, the Court observed: "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.* (quoted in *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 382 (1997)).

While it is true that prior to passage of the Act, other laws made it illegal to use or threaten force against patients and to hinder or impede their access to clinics, these prior existing legal tools had proved unworkable. *See* Pet. App. 95a. And just like the situation described in *Burson*, a woman who is on her way into a clinic to obtain private medical services, and who is first forced to pass closely by a group of protesters, easily could feel intimidated. J.A. 23-24. Even more so than in the polling place context, that patient could be driven away from exercising her right to reproductive health care "before remedial action can be taken." *See* Pet. App. 140a, 143a (showing that this in fact occurred here).

Local and state authorities are in the position to recognize such unresolved harms, and they are charged with the responsibility of creating a better regulatory scheme. Now, the Act's 35-foot fixed buffer zone is clear and enforceable, and it prevents the problems that police cannot address at the moment they occur.[6]

The floating buffer zone first tried by Respondents also had additional, unique problems. Using a "consent" standard – in volatile circumstances on the

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[6] From an administrative perspective, an objective rule also allows governments to devote less police time to this one type of public safety issue. Clear rules like this one are essential for state and local governments with limited resources, including reduced police forces (as described above in Part I).

public way – puts state and local governments in an untenable situation. First, it is seldom possible to prove or disprove a patient's "consent" to a close-up conversation with a protester. J.A. 31, 50. Moreover, attempting to enforce such a subjective standard may lead to new problems: claims of unconstitutional enforcement. J.A. 60.

Here, the Record shows that many times, unless a patient was adamant in communicating her desire to be left alone, sometime a look or a mumbled phrase was enough for some sidewalk counselors to assume consent.[7] Without a clear-cut rule, entering patients are not assured unimpeded access, and protesters and police may disagree on whether consent was given or the law was broken.

Significantly, reaching consensus on what happened in these circumstances may not even be possible. This is demonstrated by a fascinating recent experiment. It was designed to test individuals' perceptions of key facts relevant to distinguishing constitutionally protected "speech" from unprotected "conduct." *See* Dan M. Kahan et al., *"They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012). After being shown video of an actual political protest, subjects disagreed sharply

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[7] *See, e.g., McGuire v. Reilly*, 573 F. Supp. 2d 382, 395 n.81 (D. Mass. 2002) (quoting Martha Coakley Written Testimony at 4-6) (One problem with enforcing the 2000 Act was "the inability to discern whether a patient, her companions, or facility employees have consented to a given protester's approach. Some protesters have said that they believed that a patient 'consented' because of the way she made eye contact or because a patient uttered a statement in response to a protester's comment (even if that statement was not one of consent).").

on the key "facts" – including whether the protesters obstructed and threatened pedestrians. *Id.*

Moreover, requiring use of the subjective "consent" standard puts governments at risk of ongoing constitutional litigation and money damages. It is an essential First Amendment principle that government officials may not have discretion regarding whether to limit particular speech or in choosing among speakers. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (upholding park district event permit system where officials could only deny permits based on listed, objective factors); *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008) (upholding city ordinance requiring those who wish to picket on public ways to provide the city with prior notice of intent on the grounds that it did not give municipal officials any discretion to grant, deny, or set conditions on permission to demonstrate). The 35-foot fixed buffer zone both guides police and protects protesters by clarifying what constitutes a violation.

When governments enact time/place/manner regulations, inherent in their decision is a determination that – whatever other laws are on the books – the identified problem has not been solved. If the prior existence of ineffective laws makes such regulations unconstitutional, few will survive.

2. *Cumulative Impact is What Matters: No Time/Place/Manner Regulation is Unconstitutional Because Some Individual Speakers, Standing Alone, May Not Cause Harm*

Petitioners also assert that the Act is not narrowly tailored because it applies to their own ostensibly harmless, polite, consensual speech. The Act, of course,

was passed to solve problems caused by the broad spectrum of clinic protesters.

This Court previously rejected the reasoning put forth here by Petitioners. *See Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In evaluating a challenged time/place/manner rule, *Heffron* established, the inquiry is not whether there would be public safety problems if *only Petitioners* were allowed to speak at the restricted location. *Id.* at 652. Rather, courts must evaluate the negative impact if *all* persons who wish to speak at the relevant location were allowed to do so, and then ask whether the law is narrowly tailored to address that comprehensive set of problems. *See id.* ("the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the . . . rule may not be enforced with respect to ISKCON"). In *Heffon*, the Court held that requiring solicitations to be permitted everywhere on the Minnesota State Fair grounds, not only by the International Society for Krishna Consciousness (ISKCON) but also by all other nonprofit groups, "would prevent the State from furthering its important concern with managing the flow of the crowd." *Id.* at 654.

A sample case applying *Heffron* involved a security arrangement for an annual mass for government dignitaries, where demonstrators and other speakers were barred from entering a multiple-block area around the church. *See Mahoney v. United States Marshals Service*, 454 F. Supp. 2d 21 (D.D.C. 2006). There, plaintiffs argued that they themselves posed no threat to anyone's safety, and that it would make little marginal difference if they were allowed to stand where they wanted to on the south Rhode Island

Street sidewalk. The court stated that a time, place, and manner restriction "'should not be measured by the disorder that would result from granting an exemption solely to'" the complainant; rather, courts must look to what would happen if every individual to which a restriction applies were freed of its limitations. *Id.* at 37 (quoting *Heffron*, 452 U.S. at 652-54).

It may be true that some, or even most, patients do not feel unsafe or intimidated by contact with the very nicest of demonstrators, those like the Petitioners, who politely ask if they can describe the options and support available if a woman decides against abortion. *See* Pet. App. 11 (describing Petitioners' conduct). But they are just one subset of those who congregate outside reproductive health clinics to protest and counsel against abortion. J.A. 111, 114. There is extensive evidence that in this case, like all other clinic buffer zone cases, many protesters aggressively harass women, yelling, intimidating, wielding large graphic signs, and even causing fear of physical violence. *McCullen v. Coakley*, 573 F. Supp. 2d 382, 392 (D. Mass. 2008). This is the public safety problem which state and local governments must be allowed to address. Adopting Petitioners' approach would preclude effective time/place/manner restrictions in many circumstances.

C. The Act Leaves Ample Alternatives for Communication: Speakers are Not Entitled to Their First-Choice Method of Addressing a Potential Audience

Petitioners here assert that if they are prohibited from approaching women up close and speaking in conversational tones, they are "far less likely to reach persons who would not deliberately seek out the

information petitioners offer." Pet. App. 47. They argue that the Act does not leave open ample alternative channels for communication because it leaves them with "less effective" means for communicating their message of alternatives to abortion. Pet. Br. 46.

This claim misstates the applicable standard,[8] and ignores the rationale for the time/place/manner principle. It is *always* the case that plaintiffs believe the method they have chosen to deliver their message is the most effective, and that the challenged regulation leaves them with a less effective option. The point is that the First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron,* 452 U.S. at 647. Rather, it protects the right of every citizen to "reach the minds of willing listeners; . . . there must be *opportunity to win their attention*." *Hill,* 530 U.S. at 728 (emphasis added). "Speakers are not entitled to their ideal means of communication." *Ross v. Early*, 758 F. Supp. 2d 313, 322-23 (D. Md. 2010).

The principle is clearly illustrated in *Heffron,* where a Hare Krishna group (ISKCON) wanted to solicit funds while proselytizing at the Minnesota State Fair. The Court observed: "In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for

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[8] Tellingly, as their source for the "less effective" standard, Petitioners rely on an inapposite residential sign case. *Id.* (quoting *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (holding unconstitutional a law prohibiting residents from displaying "for sale" signs on their lawns).

literature." 452 U.S. at 653. Nonetheless, the Court upheld the rule limiting all solicitation to rented booths, noting that ISKON still was able to solicit both from a booth and from outside the fair grounds. Despite ISKON's strong belief to the contrary, the Court deemed these alternatives adequate. *Id.* at 654.

This is the usual approach in all the countless court decisions upholding time/place/manner regulations. In a very relevant recent case, the Seventh Circuit specifically rejected the claim that a place restriction failed the "ample alternative" test because it made close "one-on-one" conversations more difficult. In *Marcavage v. City of Chicago*, the court upheld the City's restrictions on a religious group's "outreach activities" during the "Gay Games," an annual homosexual athletic and cultural event. 659 F.3d 626 (7th Cir. 2011). There was significant pedestrian traffic congestion on the sidewalks surrounding the events, and police directed plaintiffs to keep moving or move to adjacent areas if they wanted to stand and approach people or distribute handbills. At the Soldier Field event, plaintiffs were directed to a gravel area next to the sidewalk. *Id.* at 629.

The plaintiffs in *Marcavage* argued that the designated area was not an adequate alternative because standing there "prevented them from engaging attendees in a 'one-on-one' presentation" of their Gospel message and caused them "difficulty handing out Gospel tracts from their position on the gravel." *Id.*

Applying the standard used for all challenges to time/place/manner regulations, the Seventh Circuit stated: "the fact that the permissible locations were not the plaintiffs' preferred venues does not render them inadequate." Because the alternate locations

were "*within view and earshot* of those traveling to the Games," *id.* at 631 (emphasis added), the court held that "the plaintiffs had ample opportunity to capture the attention of the Games attendees and supporters . . . ." *Id.* (relying on *Hill v. Colorado*, 530 U.S. at 728).

In contrast, when courts do find that a location restriction fails to provide ample alternatives, the limits typically are quite burdensome – ones that virtually ensure speakers will not be heard by their intended audience. For example, the Ninth Circuit struck down a rule restricting animal-rights protesters to a few "free expression zones" because these areas were located at the outside perimeter of a large parking lot, far from stadium entrances, and even far from most of the attendees' parked cars. *Kuba v. I-A Agricultural Assoc.*, 387 F.3d 850 (9th Cir. 2004); *see also Operation Save America v. City of Jackson, WY*, 275 P.3d 438 (Wyo. 2012) (holding unconstitutional a TRO against anti-abortion protesters in part due to its excessive geographical scope: protesters were barred not only from the festival's town square location, but also from streets and sidewalks two blocks in each direction).

Here, the Massachusetts Act leaves available many ways to communicate the pro-life message, including Petitioners' particular message of support and alternatives to abortion. Protesters still may stand right next to an approaching patient and talk to her while she is walking down a sidewalk that leads to the clinic, but which is still outside the 35-foot buffer zone. J.A. 32, 34, 125. Also, 35 feet is not a very large distance. In fact, it is less than the distance from the typical home's front door to the sidewalk, and certainly many neighborly conversations are initiated from that

position. Moreover, if Petitioners are concerned about the volume required to speak from 35 feet away, they retain good options to politely convey their supportive message. For example, they could display non-confrontational signs which convey a person's or organization's offer of help, as well as the immediate availability of informative leaflets and supportive conversation. J.A. 34. This kind of outreach would effectively invite willing listeners to participate in the kind of civilized conversation Petitioners seek. On the other hand, acceding to Petitioners' characterizations of the "ample alternatives" and other parts of the time/place/manner test would unravel this long-established constitutional framework.

***

If the fixed buffer zone used in the Massachusetts Act is held unconstitutional, the impact will be far-reaching: state and local governments will lose their primary tool for addressing public safety issues while respecting First Amendment speech rights.

CONCLUSION

We respectfully request this Court to affirm the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEVADA, NEW MEXICO, OREGON, VERMONT, WASHINGTON AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature adopted a fixed buffer zone that limited "entering" or "remaining" in areas next to the entrances of reproductive healthcare facilities. See Mass. Gen. Laws ch. 266, § 120E½ (2012). The Legislature took this action in response to twenty years of weekly, targeted protest at facilities across Massachusetts that blocked doors and driveways and made patients, staff, and passersby feel unsafe. The solution Massachusetts adopted, after other approaches had failed, struck the right balance: permitting safe passage over short stretches of sidewalk at facility entrances, while also preserving robust communication—in all forms—between advocates and patients on the streets and sidewalks surrounding facilities.

The questions presented are:

1. Whether Massachusetts' regulation of conduct in the area immediately around facility entrances to preserve public safety and patient access constitutes a permissible time-place-manner regulation under the Free Speech Clause of the First Amendment.

2. Whether the Court should decline petitioners' invitation to review and overturn *Hill v. Colorado*, 530 U.S. 703 (2000), where this case does not present the issues unique to *Hill*.

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INTEREST OF THE AMICI STATES

Amici States New York, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Nevada, New Mexico, Oregon, Vermont, and Washington, and the Territory of the U.S. Virgin Islands,[1] file this brief in support of respondent Martha Coakley, Attorney General for the Commonwealth of Massachusetts. Amici States have a compelling interest in protecting their ability to legislate for the protection of the health and welfare of their citizens, including securing safe and unimpeded access to reproductive health care services. Although the challenges faced by amici States in securing this access—and the means used to do so—may vary widely, they share a common interest in preserving the flexibility to achieve this goal through a range of strategies tailored to their particular needs and circumstances. Whether legislating at the state-wide level or by permitting their municipalities to address problems at the local level as appropriate, amici States seek to preserve their ability to have at their disposal a range of options consistent with the First Amendment.

This Court has held that, in appropriate circumstances, demonstrators may be barred entirely by court-ordered injunctions from narrow fixed buffer zones around entrances to facilities providing reproductive health care services, *see Madsen v. Women's Health Care Ctr., Inc.*, 512 U.S. 753 (1994) (36 feet); *Schenck v. Pro-Choice*

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[1] The Territory of the U.S. Virgin Islands is not a State, but has a strong interest in this matter similar to that of the States, and it is accordingly included in this brief's references to "Amici States."

Network of W. N.Y., 519 U.S. 357 (1997) (15 feet), and that demonstrators may be barred more generally from making close and unwanted approaches to people within a somewhat broader fixed radius, *see Hill v. Colorado*, 530 U.S. 703 (2000) (100 feet). Massachusetts tried the latter approach, found it did not work, and resorted to a law of general applicability that utilized a fixed buffer zone. Amici States urge the Court to respect a State's considered determination, informed by its own practical experience, that in order to control the traffic congestion that was obstructing access to its reproductive health care facilities, it was necessary to ban non-transitory use of the sidewalks within a narrow fixed buffer zone outside those facilities.

In establishing this buffer zone, Massachusetts made a judgment analogous to the judgments many States have made in establishing buffer zones at polling places and funeral or memorial services.[2] All of these buffer zones have been created to respond to a need for protection that is based on experience. The Court should not undermine the ability of the States to identify such needs and to fashion a workable legislative response.

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[2] *See* Brief of Michigan and 11 Other States, as Amici Curiae, at 5 n.1, 7 n.2 (collecting polling place buffer-zone laws from all 50 States, as well as funeral buffer-zone laws from 43 States and the United States). While these amici States reaffirm the importance of preserving the States' authority to impose buffer zones in different contexts (Br. at 1, 3-9), they attempt to distinguish Massachusetts' law by claiming it is not content neutral (Br. at 9-12). Once the law's content neutrality is established, however, *see infra* pp. 21-25, it merits the same respect as buffer-zone laws in other contexts.

STATEMENT OF THE CASE

Massachusetts has a decades-long history of targeted protests, harassment and violence resulting in severely compromised access to health care facilities that offer abortion services. Joint Appendix ("J.A.") 12-24. Its legislature sought to address the problem in 2000 by enacting the Massachusetts Reproductive Health Care Facilities Act. *See* 2000 Mass. Acts ch. 217, § 2 (*reproduced at* Pet. App. 130a-131a); *see also McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) (upholding facial validity of 2000 law). Modeled after the law upheld by this Court in *Hill v. Colorado*, 530 U.S. 703, the 2000 Massachusetts law similarly focused on curbing unwelcome close approaches. The law made it unlawful, within 18 feet of the entrance to a health care facility that offers abortion services, for any person (other than those specifically exempted)[3] to knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling," absent consent. Pet. App. 130a. Because laws of this nature provide a protected space that travels with an individual accessing a facility, they are known as "floating bubble" or "floating buffer" zone laws. The Massachusetts law additionally prohibited knowingly impeding or obstructing access to facility entrances. 2000 Mass. Acts ch. 217, § 2(e).

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[3] The law exempted four categories of persons, namely (1) those entering or leaving the facility; (2) employees or agents of the facility acting within the scope of their employment; (3) law enforcement, emergency services providers, construction and utility workers, and other municipal agents acting within the scope of their employment; and (4) those using the public way adjacent to the facility solely for the purpose of reaching another destination. Pet. App. 130a-131a.

For years following enactment of the 2000 law, physical ingress and egress to reproductive health care facilities throughout Massachusetts remained severely compromised. A legislative hearing revealed that, among other problems, the law did little to reduce the crowds that routinely congregated in the immediate vicinity of facility entrances and driveways for the purpose of engaging in lawful protest activities (on both sides of the abortion issue) from a relatively stationary position. *See, e.g.*, J.A. 62, 67, 78, 80, 85-86, 88-89. At one clinic, protesters routinely moved ever closer to the entrance, even vying with each other by pushing and shoving for the most desirable positions in front of that entrance. J.A. 44, 85, 123.[4] At the same time, the risk of prosecution under the 2000 law proved insufficient to deter repeated violations of the law, as many protesters remained willing to flout the law's requirements. J.A. 31, 36, 41, 60, 67-71,

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[4] *See also* J.A. 50-51, 62, 96, 124 (protesters sometimes position or space themselves so as to force patients to squeeze by); J.A. 44, 85 (concentration of protesters in zone holding large umbrellas during rainy weather caused escorts to nearly be hit in the eye or fall while trying to avoid being poked); J.A. 50 (protesters "regularly crowd" and stand "right at the entrance" of Boston clinic which has a recessed door); J.A. 41 (protesters' large signs and parked cars obstruct motorists' views, resulting in accidents); J.A. 51, 55 (presence of protesters impeded normal flow of traffic and created dangerous conditions and serious safety risks for anyone trying to use the public ways); J.A. 69 (police captain describing atmosphere as "a goalie's crease" because "everybody is in everybody's face"); J.A. 86 (clinic security director stating "the safety issue is scary" and it is "a terrible situation safety-wise for everybody on the street," including patients, employees, pedestrians, and protesters themselves); J.A. 123 (combined presence of pro-choice and anti-abortion protesters "around the front entrance would effectively block the door").

78-79, 95-96, 123-24. Thus the law did not in fact relieve the concentration of protest activities, both lawful and unlawful, that continued to occur right up in front of facility entrances and block access.

In 2007, the State responded with a new approach. After further deliberations and legislative findings, the Massachusetts Legislature revised the 2000 law by deleting the ban on close unwanted approaches within 18 feet of the entrance, and replacing it with the law challenged here—a ban on non-transitory presence within 35 feet of the entrance. 2007 Mass. Acts ch. 155 (*codified as amended at* Mass. Gen. Laws ch. 266, § 120E½(b) (2012), and *reproduced at* Pet. App. 219a-221a).

The new law establishes a 35-foot fixed buffer zone around the driveways and entrances of health care facilities (other than hospitals) where abortions are offered or performed. Under the law, no person can knowingly enter or remain in the buffer zone of such a facility during business hours, with the exception of four classes of persons whose transient presence is permitted as necessary: (1) those entering or leaving the facility; (2) employees or agents of the facility acting within the scope of their employment; (3) law enforcement, emergency services providers, construction and utility workers, and municipal agents acting within the scope of their employment; and (4) those using the public way adjacent to the facility solely for the purpose of reaching another destination. Mass. Gen. Laws ch. 266, § 120E½(b).[5] The record establishes that the revised law is working. It has moved the crowds back from the

[5] The other provisions of the 2000 law remained unchanged.

immediate vicinity of facility entrances and doorways, and thus facilitated access, while still permitting protesters to engage in a wide range of expressive activities near facility entrances—including leafleting and engaging in close quiet conversations with others—just outside the buffer zone. *See, e.g.*, J.A. 97-98, 102, 114-18, 125-30, 204-13, 228-40, 255-65.

Alleging that the revised law violates their First Amendment rights, petitioners challenged the law both on its face and as applied at three facilities in the State, one in Boston, one in Springfield, and one in Worcester. Petitioners' facial and as-applied challenges were tried separately. Both challenges were rejected by the courts below. In *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1881 (2010) (*reproduced at* Pet. App. 93a-120a), the Court of Appeals held that, on its face, the law was a valid time-place-manner restriction because it was both content and viewpoint neutral; served a valid public safety purpose; was not overbroad; and left open adequate alternative channels of communication notwithstanding a diminution in particular types of expressive activities. And in *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013) (*reproduced at* Pet. App. 1a-28a), the Court of Appeals held that application of the law to petitioners' activities at the subject three facilities did not violate petitioners' rights because the buffer zones left open adequate alternative means of communication.

SUMMARY OF ARGUMENT

1. States and municipalities across the Nation have been called upon to address a range of concerns implicating access to health care facilities that provide

abortion services. These concerns, expressly recognized by this Court as significant, include "protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being [are] threatened." *Schenck*, 519 U.S. at 372; *see also id.* at 375-76 (explaining these concerns). At the same time, States must balance these concerns against the First Amendment rights of their citizens to engage in a range of expressive activities, including protests or demonstrations on either side of the divisive issue of abortion. And they must have the flexibility to do so in the manner they deem most appropriate for their particular circumstances, consistent with the First Amendment.

This Court has thus far approved a variety of regulatory measures fashioned by States and their municipalities to address their particular challenges. These include the floating bubble-zone law upheld in *Hill*, 530 U.S. 703, and the court-ordered injunctions approved in *Madsen*, 512 U.S. 753, and *Schenck*, 519 U.S. 357, precluding named parties from entering fixed buffer zones outside reproductive health care facilities. But after many years of experience with targeted injunctions and a floating bubble-zone law, Massachusetts concluded that neither of these measures could effectively resolve the intractable problem it faced throughout the State of blocked physical access at health care facilities that offer abortion services. Massachusetts finally addressed that problem by establishing a 35-foot fixed buffer zone around the entrances and driveways of those facilities. The lack of success Massachusetts experienced with the alternative

methods it tried demonstrates the need for States to have sufficient flexibility to address their particular challenges in the manner they deem most appropriate.

2. Massachusetts' state-wide fixed buffer-zone law should be upheld as a facially valid time-place-manner restriction on speech. (For the response to the as-applied challenge, amici States defer to Massachusetts' factual analysis.)

Massachusetts' law is content neutral on its face, because it does not single out any particular message or speaker, or indeed address expressive activity at all. It simply excludes all persons from the zone except those who need to pass through for reasons unrelated to expressive activities. The law's justification is also content neutral. It simply moves the crowds that have been plaguing Massachusetts' reproductive health care facilities back from the immediate vicinity of facility entrances and driveways in order to provide a safe corridor for those wishing access. Although Massachusetts previously enacted a bubble-zone law forbidding close unwanted approaches near facility entrances, like the one upheld in *Hill*, that law proved inadequate for this purpose. Among other things, it did not at all address the crowding caused by individuals engaged in peaceful expressive activities from a stationary position or upon a consensual approach. Massachusetts' current law thus does not aim at the suppression of speech at all, but rather at the secondary effects of that speech—unacceptable crowding conditions that blocked physical access. And because it serves purposes unrelated to the content of expression, its content neutrality is not vitiated by either the fact that the law may disproportionately burden the speech

of those with anti-abortion views, like petitioners, or that it only applies at health care facilities that offer abortion services; those locations are the only places where the problem existed.

Nor does the fact that the law permits facility employees and agents acting within the scope of their employment to pass within the zone undermine the content neutrality of the law. This exemption is entirely consistent with the law's intended purpose of relieving congestion at facility entrances and keeping pedestrian traffic moving. Facility employees act within the scope of their employment when they escort patients into the facility. Their presence is transient—like the presence of the patients themselves—and the purpose of their presence is to help patients into the facility, and not to communicate or express anything. The transient presence of these employees is necessary for the proper functioning of the facility; they may not, however, remain in the zone except as necessary to perform their job duties.

Moreover, the plain language of the statute is easily read to permit *any* exempt individual—including petitioners if they are passing through the zone to reach a destination on the other side—to engage in expressive activities on their way through the zone. Read this way, the statute does not prohibit any expression by exempt persons, whether advocates or facility agents and employees, while moving lawfully through the zone, but it does prevent them from adding to congestion by stopping or lingering in the zone to engage in such expression. Because the statute does not on its face prohibit—or even reference—expressive activity, it is content neutral.

As a content-neutral time-place-manner restriction, Massachusetts' buffer-zone law is subject to intermediate scrutiny, and it easily meets that test. There is no dispute about Massachusetts' significant, indeed compelling, interest in ensuring safe and secure access to health care facilities, particularly when the constitutionally recognized right to reproductive freedom is implicated. The law is narrowly tailored to this interest because it directly and effectively addresses the long-standing problem that Massachusetts faced, namely, crowds of protesters routinely congregating directly in front of facility access points, by moving those crowds back 35 feet to clear obstructed pathways. Indeed, the 2007 law has actually worked to keep entrances clear and traffic moving. Neither the size of the buffer zone nor the fact that Massachusetts could hypothetically have devised some still narrower means to address its particular problem makes the statute unconstitutional because the means chosen to achieve Massachusetts' significant interest need not be the least restrictive. And the statute leaves open ample alternative means of communication. Although petitioners cannot stand directly in front of facility entrances, they may continue to engage in their preferred communication activities within the sight, hearing, and presence of their target audience just outside the buffer zone.

3. Finally, this case presents no occasion to consider either the scope or continuing vitality of this Court's holding in *Hill*, 530 U.S. 703, in view of the substantial differences between the Massachusetts law and the Colorado law at issue in *Hill*. The Massachusetts fixed buffer-zone law is quite different from the Colorado law. It applies only to those health care facilities that offer abortion services, because it was only at such facilities

that Massachusetts for years experienced the crowding conditions that blocked facility access. It restricts activities only within a 35-foot radius of the facilities covered, as opposed to the wider 100-foot radius in which Colorado's bubble-zone law applied. And within this more modest radius, it precludes physical presence altogether, with the limited exceptions previously discussed, because it is designed to address crowding, and not merely unwanted close approaches. The Massachusetts law thus requires no examination of the content of a speaker's communication to determine whether the speaker's conduct is prohibited. The content of a speaker's message is irrelevant.

Because the two statutes are so different in both purpose and effect, they do not stand or fall together. It would be possible to have doubts about the Colorado law and still uphold the Massachusetts law, and the reverse is true as well. The Massachusetts law is properly analyzed—and validated—under this Court's long-standing time-place-manner jurisprudence that substantially predates *Hill*. There is therefore no reason to revisit *Hill*.

ARGUMENT

I. States must have flexibility to protect access to health care facilities by methods that respond to local conditions.

This Court has long recognized the States' strong interest in protecting the health and welfare of their citizens. To that end, States have been accorded "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" because such matters are "primarily, and

historically . . . matter[s] of local concern." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (ellipsis and alteration in original) (internal quotation marks omitted). In particular, this Court has long recognized "the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *accord Hill v. Colorado*, 530 U.S. at 728-29. And the Court has recognized that the States' interest in their citizens' health and welfare "may justify a special focus on unimpeded access to health care facilities." *Hill*, 530 U.S. at 715 (*citing Madsen*, 512 U.S. 753).

Safeguarding access to health care facilities that provide abortion services has posed a special challenge to States and municipalities. Organized efforts to obstruct such access implicate the States' interests in "protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being [are] threatened." *Schenck*, 519 U.S. at 372; *see also id.* at 375-76 (describing these interests as "significant"). Efforts to ensure this access, however, may also implicate the right to freedom of speech guaranteed by the First Amendment, including the right to engage in expressive activities aimed at influencing women's decisions about how to exercise their reproductive freedom. States and municipalities, when regulating in this area, must therefore be ever sensitive to the potential tension between these important rights. Due to differences among States (and among municipalities within States)—differences that may be related to their size and geographic location, population

characteristics, governmental resources, and their own unique reproductive rights history—not every State or municipality will confront identical problems or tackle problems in the same way. They may arrive at their most appropriate and effective solutions by way of trial and error. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

In the forty years since the Court in *Roe v. Wade*, 410 U.S. 113 (1973), first recognized a woman's constitutional right to reproductive freedom, amici States have formulated a variety of measures to address their myriad concerns in this area. These measures include:

- laws of general applicability enforced by civil proceedings for injunctive relief and/or criminal sanctions that prohibit harassment, threats, or the use of force outside facilities, property damage, and/or the intentional obstruction of or interference with pedestrian or vehicular access;[6]

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[6] *E.g.*, Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248; Cal. Penal Code § 423; D.C. Code § 22-1314.02; Kan. Stat. Ann. § 21-5808; N.C. Gen. Stat. § 14-277.4; Md. Code Ann. Crim. Law § 10-204(c); Mich. Comp. Laws Ann. § 333.20198; Minn. Stat. § 609.7495; Nev. Rev. Stat. § 449.760; N.Y. Penal Law §§ 240.70 to 240.71, N.Y. Civil Rights Law § 79-m; Or. Rev. Stat. § 164.365(1)(E); Wash. Rev. Code § 9A.50.020; Wisc. Stat. § 943.145.

- fixed buffer-zone laws that exclude all unnecessary presence within a specified distance of facility entrances and driveways;[7]

- floating bubble-zone laws that provide a protective space around individuals accessing facilities within a certain distance of those facilities and within which approaches by others are allowed only upon consent;[8]

- modified buffer-zone laws that require protesters to withdraw a fixed distance away from a facility entrance upon the request of someone entering or exiting the building;[9]

- laws requiring assembled persons obstructing access or threatening the peace outside a facility to disperse when directed by police and prohibiting

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[7] *E.g.*, Mass. Gen. Law ch. 266, § 120E½ (35-foot zone); Burlington, Vt., City Ordinance §§ 21-111 to 21-115 (35-foot zone); Pittsburgh, Pa., Code of Ordinances § 623.04 (15-foot zone); Portland, Me., City Code § 17-110 (as amended November 18, 2013) (39-foot zone); San Francisco, Cal., Police Code, §§ 4302-4303 (25-foot zone); Santa Barbara, Cal., City Ordinance § 9.99.020 (8-foot zone).

[8] *E.g.*, Colo. Rev. Stat. § 18-9-122(3) (8-foot bubble within 100-foot radius); Mont. Code Ann. § 45-8-110 (8-foot bubble within 36-foot radius); Chicago, Ill., Code of Ordinances § 8-4-010(k) (8-foot bubble within 50-foot radius); Oakland, Cal., Code of Ordinances § 8.52.030 (8-foot bubble within 100-foot radius); Sacramento, Cal., City Code § 12.96.020 (same); San Jose, Cal., Code of Ordinances § 10.08.030 (same).

[9] *E.g.*, San Diego, Cal., Mun. Code § 52.1001 (15-foot zone).

such persons from congregating again within a certain distance of the facility for a certain period of time;[10]

- and other laws prohibiting specific conduct such as creating excessive noise outside facilities, telephone harassment of facility staff, or the possession of a weapon during demonstrations outside a facility.[11]

Indeed, a single State may use a number of these methods in combination. For example, in response to a wave of violence and intimidation at reproductive health care facilities in the 1990s, including the murder of a New York physician who performed abortions, New York enacted legislation that, much like the federal Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248, prohibits threats of violence or the use of force outside such facilities, and also bars the knowing obstruction of pedestrian or vehicular access. New York Clinic Access Act, 1999 N.Y. Laws ch. 635, § 2 (*codified at* N.Y. Penal Law §§ 240.70 to 240.71 (McKinney 2008 and Supp. 2013) and N.Y. Civil Rights Law § 79-m (McKinney 2009)); *see also* 1999 N.Y. Legis. Ann., at 373 (describing history that led to enactment); *Schenck*, 519 U.S. 357 (same). New

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[10] *E.g.*, Concord, N.H., Code of Ordinances §§ 4-9-1 to 4-9-3 (no reassembly within 50 feet of facility before morning of following day); Los Angeles, Cal., Mun. Code § 56.45(b) (no reassembly within 50 feet of facility for four hours).

[11] *E.g.*, D.C. Code § 22-1314.02(a)(2), (4) (noise and phone harassment); Me. Rev. Stat. tit. 5 § 4684-B(2) (noise intended to jeopardize health of patients and phone harassment); N.C. Gen. Stat. § 14-277.2 (possession of weapon); Wash. Rev. Code § 9A.50.020(2), (4) (noise and phone harassment).

York's law is usually enforced by permanent injunctions secured by the State (or sometimes private parties) that create fixed buffer zones precluding the activities of particularly virulent protesters on a case-by-case basis. *See, e.g.*, *Schenck*, 519 U.S. 357; *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184 (2d Cir. 2001).

Whether obtained under the federal FACE Act or New York's Clinic Access Act, however, such injunctions are not always effective. Because injunctions bind only the individuals or groups named, they may be circumvented if named parties are able to find others to take their places. *See, e.g.*, *New York ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64 (2d Cir. 1996). And if the physical layout of facilities is changed, through renovation or expansion projects, for example, further judicial proceedings may be required to modify the precise fixed buffer zones previously obtained. *See, e.g.*, *New York ex rel. Schneiderman v. Kraeger*, 914 F. Supp. 2d 223 (N.D.N.Y. 2012). Thus, New York City—after legislative findings that other laws did not adequately safeguard facility patients and staff—enacted enhanced local protections that, among other things, prohibit protesters from following and harassing anyone within a 15-foot buffer zone around entrances to reproductive health care facilities. Access to Reproductive Health Care Act, N.Y.C. Admin. Code §§ 8-801 to 8-807 (2013); *see also* 2009 N.Y.C. Legis. Ann., at 118-25 (explaining continuing problems and 2009 amendments); *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457 (S.D.N.Y. 2006) (describing continued violence, threats, and atmosphere of danger outside Manhattan facility).

State and local legislation in this context, while protecting significant state interests on behalf of some of its citizens, may implicate the First Amendment rights of others. Indeed, health care facilities providing abortion services have long been a focal point for a range of expressive activities on both sides of the abortion debate. As happened in Massachusetts and some other States, these activities may become harassing, threatening, assaultive, or physically obstructive. When that happens, state and local governments must impose some reasonable time-place-manner restrictions in order to balance the need to protect the health and safety of their citizens with the sometimes competing interests of those who seek to engage in expressive activities on public ways. By approving a range of regulatory measures, the Court has thus far afforded the States sufficient flexibility to address the particular challenges they face in the manner they deem most appropriate, despite incidental burdens on protected speech.

For example, in *Hill v. Colorado*, 530 U.S. 703, Colorado established a pattern of harassment, intimidation, and assaults of abortion clinic patients, as well as a link between that unwelcome conduct and the efficacy of the medical care ultimately received. As a result, the Court upheld a floating bubble-zone law that prohibited close unwanted approaches near facility entrances, as a valid time-place-manner restriction. And in two other cases implicating access to reproductive health care facilities, the Court upheld States' use of content-neutral injunctions that, among other things, precluded named parties from entering fixed buffer zones outside such facilities. *See Madsen*, 512 U.S. 753; *Schenck*, 519 U.S. 357. In *Madsen*, the buffer zone extended 36 feet from a designated facility,

and in *Schenck*, it extended 15 feet from several regional facilities.[12] These decisions have thus already validated the use of prophylactic buffer zones, both floating and fixed, to assure access to health care facilities.[13]

But neither the use of injunctions obtained on a case-by-case basis, nor the 2000 floating bubble-zone law modeled after the one at issue in *Hill*, effectively resolved Massachusetts' continuing problem of blocked physical access to reproductive health care facilities throughout the State. Under such circumstances, Massachusetts,

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[12] The *Schenck* Court also invalidated the injunction's 15-foot floating buffer zone around "any person or vehicle seeking access to or leaving" a facility (presumably at any distance from the facility). 519 U.S. at 377. The Court nevertheless foreshadowed its decision in *Hill* by expressly reserving the possibility that government interests could in the appropriate case "justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two." *Id.*

[13] Relying on this Court's guidance in these cases, federal courts have thus far overwhelmingly approved similar buffer-zone laws as constitutional on their face. *See Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) (ordinance establishing *Hill*-type bubble zone facially valid but city's admittedly selective enforcement policy was unconstitutional); *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009) (holding that city may constitutionally impose either a 15-foot fixed buffer zone or a *Hill*-type bubble zone, but not both); *Clift v. City of Burlington*, 925 F. Supp. 2d 614 (D. Vt. 2013) (holding 35-foot fixed buffer zone facially valid), *appeal pending* (2nd Cir.); *see also Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998) (pre-*Hill* case upholding 8-foot fixed buffer zone, but striking provision creating floating bubble zone). *But see Halfpap v. City of W. Palm Beach*, No. 05-80900-CIV, 2006 WL 5700261 (S.D. Fl. 2006) (invaliding 20-foot fixed buffer zone where record did not establish history of blocked facility access).

or any other State so situated, should not be limited to remedies previously tried and found insufficient. Rather, because its state-wide fixed buffer zone is content neutral, and satisfies the intermediate scrutiny to which such laws are subject, it should be upheld as a reasonable solution to Massachusetts' otherwise intractable problem of blocked access. *See Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 213-14 (content-neutral restrictions "afford[ ] the government latitude" in designing solutions and it "may employ the means of its choosing").

II. The Massachusetts fixed buffer-zone law is a facially valid time-place-manner restriction that reasonably addresses the distinctive history of congestion at health care facility entrances in that State.

Massachusetts made a carefully considered choice about the best way to clear the crowds that were physically blocking access to those health care facilities that offer abortion services, without unduly burdening the First Amendment rights of those on both sides of the abortion debate. Its solution was to enact a modest fixed buffer zone in which only essential and transient pedestrian traffic is permitted. This law is a reasonable content-neutral solution to the specific public health and safety issue that has plagued Massachusetts for decades and should be upheld as a valid time-place-manner restriction under *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

While speech on public streets and sidewalks is traditionally subject to a high degree of protection, *see Frisby v. Schultz*, 487 U.S. 474, 480 (1988), this Court has long upheld reasonable time-place-manner restrictions on

speech in order to prevent disruption, preserve the public peace, or protect ingress and egress to certain buildings. In *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a rule confining sales, solicitations, and distribution of literature to a fixed location at a state fair in order to maintain the flow and orderly movement of fair crowds. In *Cameron v. Johnson*, 390 U.S. 611 (1968), the Court upheld a law precluding picketing that interfered with ingress to or egress from public buildings or traffic on adjacent streets and sidewalks. *Id.* at 617. And in *Boos v. Barry*, 485 U.S. 312 (1988), the Court upheld a law prohibiting protesters from remaining within 500 feet of an embassy if the police reasonably believed the embassy's security or peace was threatened. *Id.* at 330.

As the Court has since explained, restrictions on the time, place or manner of speech are valid if they (1) are content neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication. *See Ward*, 491 U.S. at 790-91. Moreover, restrictions aimed at the secondary effects of speech—even a particular category of speech—such as congestion or interference with ingress to or egress from particular buildings, are viewed as content neutral as long as they "do not aim at the suppression of free expression." *Boos v. Barry*, 485 U.S. at 320 (discussing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). While a time-place-manner restriction should not "burden substantially more speech than necessary to further the government's legitimate interests," it need not be the least restrictive means of furthering those interests. *Ward*, 491 U.S. at 799-800. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes

a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 800 (ellipsis in original) (internal quotation marks omitted).

The Massachusetts law, which seeks only to assure adequate ingress to and egress from reproductive health care facilities, should similarly be upheld as a facially valid time-place-manner restriction. Massachusetts has tried alternatives that permitted more expressive conduct within 35 feet of facility entrances and driveways, but they proved ineffective at ensuring access to the facilities. Given this history, Massachusetts could reasonably conclude that its 35-foot buffer zone was necessary to achieve its goal.

A. The Massachusetts fixed buffer-zone law is content neutral.

1. Petitioners claim that the Massachusetts law is not content neutral (Pet. Br. at 22-34), but they are mistaken. As the Court has explained, in determining content neutrality, the first question is whether the challenged provision on its face distinguishes between messages or speakers, and the next question is whether the law's purpose or justification makes such a distinction. *Turner Broad. Sys., Inc. v. FCC* ("*Turner I*"), 512 U.S. 622, 645 (1994). The "'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Id.* at 642 (ellipsis and alteration in original) (quoting *Ward*, 491 U.S. at 791). The Massachusetts fixed buffer-zone law is content neutral in both respects.

The law is neutral on its face, because it does not single out any particular message or speaker.[11] Indeed, on its face, it does not address expressive activity at all. Individuals who are not expressly exempt from the law may not "knowingly enter or remain" in the buffer zone, whether or not they are engaged in expressive activity. Mass. Gen. Laws ch. 266, § 120E½(b). Thus individuals—including those on either side of the abortion debate and also spectators with no interest in the debate—are prohibited from crowding the zone, even if they are engaged in no expressive activity at all.

The Massachusetts fixed buffer-zone law is also neutral in justification. The purpose of the law is crowd control. Despite the enactment of a bubble-zone law in 2000, the Massachusetts Legislature heard ample evidence that crowds of people routinely gathered directly in front of entrances to reproductive health care facilities throughout the State, blocking ingress and egress by their mere physical presence. *See supra* pp. 4-5 and n.4 (collecting record cites). The 2007 law was designed to move these crowds back from facility entrances 35 feet—or less than the length of two average-sized cars—to assure unobstructed access. Because the law does not "aim at the suppression of free expression" and indeed has "nothing to do with [the] content" of the message sought to be conveyed by petitioners or any other persons or groups, it is content neutral. *Boos v. Barry*, 485 U.S. at 320; *see also Turner I*, 512 U.S. at 643 (laws that "impose

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[11] Although speakers near health care facilities that offer abortion services are treated differently from speakers in other locations, all of the former category of speakers are treated exactly the same, regardless of the message, if any, they might wish to convey.

burdens on speech without reference to the ideas or views expressed are in most instances content-neutral").

Petitioners claim (Pet. Br. at 22, 25-27) that the law imposes a disproportionate burden on those who, like themselves, wish to express anti-abortion views. Even if that were true, and as we explain below it is not, that would not render the law content based. It is well settled that a regulation "that serves purposes unrelated to the content of expression" will nevertheless be "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

2. The content neutrality of the Massachusetts fixed buffer-zone law is not vitiated by the fact that the law exempts facility employees and agents acting within the scope of their employment. Petitioners focus on this exemption as evidence of non-neutrality (Pet. Br. at 27-32), but in fact such employees and agents—like everyone else exempted from the ban—need to pass through the zone for reasons unrelated to any expressive activities. Patients, health care providers, and others entering or leaving the facility necessarily must pass through the zone simply to get where they are going. Passers-by may similarly require access to the public sidewalks in front of facilities to reach destinations on the other side. And municipal agents and facility employees and agents need to do their jobs, for example, maintaining the peace and assisting patients and their families as needed. As the Massachusetts Attorney General explains (Resp. Br. at 35-37), the transient presence of these exempted individuals in the buffer zone is thus necessary either for the proper functioning of the facility or simply to permit people to get where they need to go, and it is entirely consistent with the law's intended purpose of relieving

congestion at facility entrances and keeping pedestrian traffic moving.[15]

Indeed, even as to these exempted individuals, the statute is reasonably read to limit their continued presence in the buffer zone. Passers-by and those entering or leaving the facility are permitted to remain in the zone only for the time necessary to accomplish the purpose that requires their exemption, namely reaching their respective destinations. And facility employees and agents, municipal workers, and other service personnel may remain in the zone only to the extent necessary to perform their jobs.

Petitioners argue (Pet. Br. at 19, 27-28) that the scope of employment for facility employees and agents will invariably include expressive activities, and thus that the statute effectively creates "speech exclusion zones" for all persons except facility employees and agents. But there is simply no such asymmetry. In fact, the plain language of the statute is easily read to treat all individuals alike with respect to expression: it appears to permit *any* exempt individual—including petitioners if they are passing through the zone to reach a destination on the other side—to engage in expressive activities while moving lawfully through the zone. But it prohibits exempt persons, including facility agents and employees, from adding to

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[15] Amici Michigan and the other States (Br. at 10) incorrectly identify the exemption for facility patrons as further evidence that the law is content based. But a facility could provide no medical services at all if its patrons were banned from its entrances. The exemption for patrons is just another aspect of what is effectively a general exemption for those who need to pass through the zone for reasons unrelated to expressive activities.

congestion by stopping or lingering in the zone to engage in expressive activities or for any other purpose. *See* Resp. Br. at 37-38, 56 (indicating that statute should be so read).[16] Because the statute does not on its face prohibit—or even reference—expressive activity, it is content neutral.

3. The content neutrality of the Massachusetts fixed buffer-zone law is similarly not vitiated merely because it applies only at those health care facilities within the State that offer abortion services. The Massachusetts Legislature had before it evidence of a long history of congestion and compromised access at health care facilities that offer abortion services; it had no such history as to other health care facilities or, for that matter, other commercial entities more generally. Consequently, it reasonably sought to address only the problem at hand. States may "adopt laws to address the problems that confront them," and "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992). It would be anomalous, to say the least, if Massachusetts were found to have infringed on First Amendment rights because it declined to impose restrictions where none were needed.

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[16] Petitioners read (Pet. Br. at 32-33) the interpretative guidance letter issued by the Massachusetts Attorney General (J.A. 93-94) to mean that the statute prohibits facility employees and agents (and, for that matter, other exempt persons as well) from expressing their views about abortion or engaging in any partisan speech at all while otherwise lawfully in the zone. *See also* Pet. App. 205a-206a (district court read interpretative guidance in same manner). On that reading, the statute would still be content neutral, because it would permit no one to engage in expressive activities while in the buffer zone.

B. The Massachusetts fixed buffer-zone law satisfies the intermediate scrutiny to which content-neutral laws are subject.

1. The Massachusetts law is narrowly tailored to serve significant government interests. There is no dispute (Pet. Br. at 35, 45) about the significance of the State's interests in protecting the public from harm and assuring unobstructed access to health care facilities. *See supra* pp. 11-12 (identifying interests). Massachusetts also has a significant interest in protecting the ability of women in the State to exercise their constitutional right to reproductive freedom. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 851 (1992). And the Massachusetts law is narrowly tailored to advance these interests because it directly addresses the particular problem Massachusetts faced—crowds of protesters routinely congregating directly in front of entrances to reproductive health care facilities throughout the State and thereby physically obstructing access—by moving those crowds back a modest 35 feet to clear obstructed pathways to facility entrance points.

The 2007 law was enacted after a long history of obstruction, congestion and impeded access to facilities. These problems persisted even after Massachusetts tried other solutions. The floating bubble-zone law that Massachusetts enacted in 2000 did not solve these problems. With its focus on prohibiting close unwelcome and even assaultive approaches, the 2000 law was ineffective at clearing blocked entrances to facilities. Instead, the record shows that crowds of protesters continued to congregate directly in front of facility entrances for a whole host of expressive activities, only

a fraction of which were even potentially covered by the 2000 law. *See supra* pp. 4-5 and n.4 (collecting record cites). The 35-foot fixed buffer-zone law, in contrast, addresses Massachusetts' problem of blocked access directly by moving crowds back from facility entrances a reasonable distance, and Massachusetts reports that the law has actually worked to keep entrances clear and traffic moving. The law thus serves Massachusetts' interests "in a direct and effective way." *Ward*, 491 U.S. at 800; *cf. Burson v. Freeman*, 504 U.S. at 206 (examination of long history of two persistent election-time evils demonstrated that "some restricted zone" was necessary to serve the State's interests).

This Court has long recognized that the means chosen by the government to regulate the time, place or manner of speech need not be the least restrictive means possible. *See Ward*, 491 U.S. at 800. The remedy Massachusetts chose thus does not fail merely because Massachusetts might have been able to devise some "imaginable alternative that might be less burdensome on speech," beyond those it had already tried. *Id.* at 797. Indeed, the Court has time and again confirmed that it will not invalidate a legislature's preferred remedial scheme simply because "some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner II*, 520 U.S. at 217-18. [17]

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[17] Petitioners mistakenly suggest (Pet. Br. at 38-44, 47) that this fixed buffer-zone law cannot be narrowly tailored because it makes no provision for consensual speech. A consensual speech exception would make little sense in a statute like this one, designed, not to protect patients from unwanted speech, but to address a State's long-standing history of blocked facility access by keeping the zone clear of all standing traffic during business hours.

On the contrary, the Court generally gives "substantial deference" to legislative choices and predictive judgments, declining to substitute its own judgment for that of a legislative body that has "drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195, 224-25. Thus in *Hill*, the Court deferred to Colorado's judgment that a bubble-zone law was "the best possible accommodation of the competing interests at stake." 530 U.S. at 727. And in *Madsen*, the Court deferred to a state court's determination that a fixed buffer zone was necessary as a remedial matter. *See* 512 U.S. at 769-70.

Massachusetts' decision to enact a fixed buffer zone is entitled to the same deference. And its decision to establish the zone at 35 feet, rather than some lesser number, does not raise a "question of constitutional dimension." *Burson*, 504 U.S. at 210 (internal quotation marks omitted). In *Burson*, the Court described a 100-foot zone as a "minor geographic limitation" and specifically rejected the state supreme court's decision that 25 feet would suffice. *Id.* And the Massachusetts buffer zone is comparable in size to the 36-foot buffer zone upheld in *Madsen*. 512 U.S. 753. While petitioners may "quibble about whether [35] feet is too great or too small a distance if the goal is to ensure access," deference is due to Massachusetts' "reasonable assessment of the number of feet necessary to keep the entrances clear." *Schenck*, 519 U.S. at 381.

2. The Massachusetts fixed buffer-zone law leaves open ample alternative channels for substantial and meaningful communication with persons entering and leaving the facilities. Although petitioners cannot stand directly in front of facility entrances, where their physical presence may block access, they may continue to speak, leaflet, or

demonstrate within the sight, hearing and presence of their target audience only a short distance away. *See supra* pp. 5-6 (collecting record cites).[18] They may, for example, hold large signs suggesting that women do in fact have a choice and inviting women to come speak with them for help and assistance, away from the crush of facility entrances. Indeed, as amicus American Civil Liberties Union concludes (A.C.L.U. Br. at 21-22), the Massachusetts law may well facilitate "greater opportunity for face-to-face interaction than the floating buffer in *Hill* and at least as much speech as the fixed buffer in *Madsen*."

III. This case presents no occasion to revisit the Court's holding in *Hill v. Colorado*.

This case provides no occasion to consider either the scope or continuing vitality of this Court's holding in *Hill v. Colorado*, 530 U.S. 703, in view of the substantial differences between the Massachusetts law and the law at issue in *Hill*.

The Colorado law at issue in *Hill* targeted close physical approaches in the interest of protecting those seeking medical treatment from unwelcome communication that might result in physical or emotional harm. 530 U.S. at 707-10 and 728-29. The law imposed a floating bubble zone of eight feet within a larger 100-foot

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[18] Amicus American Civil Liberties Union agrees (A.C.L.U. Br. at 20) that the statute has not "eliminated any meaningful opportunity for abortion protesters to engage in conversation with people entering or leaving an abortion clinic, or to hand out leaflets" and that "the difference between exercising that opportunity at the clinic's doorstep or 35 feet away is not readily apparent."

radius of any health care facility, whether or not abortions were performed there. *Id.* at 707-08. Specifically, within that radius, the law prohibited approaching within eight feet of another, without consent, for the purpose of passing out leaflets, displaying signs, or engaging in oral protest, education or counseling. *Id.* at 707 n.1. The law did not prohibit any particular message, nor did it prohibit leafleting, protesting, counseling, or any other form of communication from a stationary position. What it prohibited was *close approaches* for the purpose of certain types of nonconsensual communication.

The Massachusetts fixed buffer-zone law is different in three important respects. First, it does not apply to all health care facilities, but only to those that offer abortion services, because it was only at such facilities that Massachusetts for years experienced the crowding conditions that blocked facility access. Second, the restrictions of the Massachusetts law apply only within a 35-foot radius of covered facilities, as opposed to the 100-foot radius in which activities were restricted in *Hill*. Thus, unlike the Colorado law, the Massachusetts law does not restrict any close approaches, whether consensual or nonconsensual, in the area ranging from 35 to 100 feet from the entrances of covered facilities. Finally, within its more modest 35-foot buffer zone, the Massachusetts law does not single out close approaches, but precludes physical presence altogether, except for those exempted individuals whose transient presence is necessary for nonexpressive purposes, such as the proper functioning of the facility or to permit people to get where they need to go.

The Massachusetts law is thus quite different from the Colorado law. The Massachusetts law is not directed at unwelcome close approaches. It addresses a different problem entirely: the physical obstruction of access to health care facilities throughout the State that offer abortion services caused by the high concentration of protesting activities that routinely take place directly in front of facility entrances and driveways. And because it does not single out close approaches for the particular communicative purposes of protest, education, or counseling, it has the distinct advantage of requiring no inquiry into the communicative purpose of the actor. *See Hill*, 530 U.S. at 766-67 (Kennedy, J., dissenting); *see also id.* at 742-46 (Scalia, J., dissenting). Under the Massachusetts law, the content of a message is irrelevant. Indeed, the law precludes an individual's physical presence in the zone even if the individual engages in no expressive activity at all. The Massachusetts law is thus more like the laws at issue in cases such as *Frisby v. Schultz*, 487 U.S. 474, where "[n]o examination of the content of a speaker's message [would be] required to determine whether an individual [was] picketing, or distributing a leaflet, or impeding free access to a building." *Hill*, 530 U.S. at 766 (Kennedy J., dissenting).

Because the two statutes are so different in both purpose and effect, they do not stand or fall together. It would be possible to have doubts about the Colorado law and still uphold the Massachusetts law, and the reverse is true as well. The Massachusetts law is properly analyzed—and validated—under this Court's long-standing time-place-manner jurisprudence that substantially predates *Hill*. *See supra* pp. 19-29. There is therefore no reason to revisit *Hill*.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,
Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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INTEREST OF *AMICI CURIAE*

This brief is submitted by the Planned Parenthood League of Massachusetts ("PPLM") and the Planned Parenthood Federation of America ("PPFA") as *amici curiae* in support of Respondents. PPLM operates the three reproductive health care facilities in Boston, Worcester, and Springfield that are the subject of petitioners' as-applied challenge.

Amici urge the Court to affirm the judgment of the Court of Appeals and uphold Chapter 266, Section 120E1/2 of the Massachusetts General Laws ("Public Safety Act" or "Act"). The Act protects the public as well as patients, staff, and volunteers of reproductive health care facilities ("Facilities"), including PPLM's. As detailed below, the Act followed thirty years of violent protests and patient harassment. Previous legislation, criminal prosecution, and injunctions all failed to keep the peace at PPLM's Facilities. *Amici* support the rights of protesters to be present and communicate their messages, but they also seek to ensure the safety of PPLM's patients and staff and maintain access to PPLM's health centers.

Founded in 1928, PPLM provides sexual and reproductive health services and education

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[1] The parties have consented to the filing of this brief, and their written consents have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

throughout Massachusetts. PPLM receives more than 50,000 patient visits annually throughout the state. Ten percent of PPLM's patients are men.

The majority of patient visits to the three Facilities at issue here are for preventative health care, including routine gynecological care, testing and treatment for sexually transmitted diseases, and cancer screenings. The Facilities in question also provide abortion services, including medically necessary surgical procedures for women who have suffered miscarriages. PPLM operates four other health centers that do not provide abortion services.

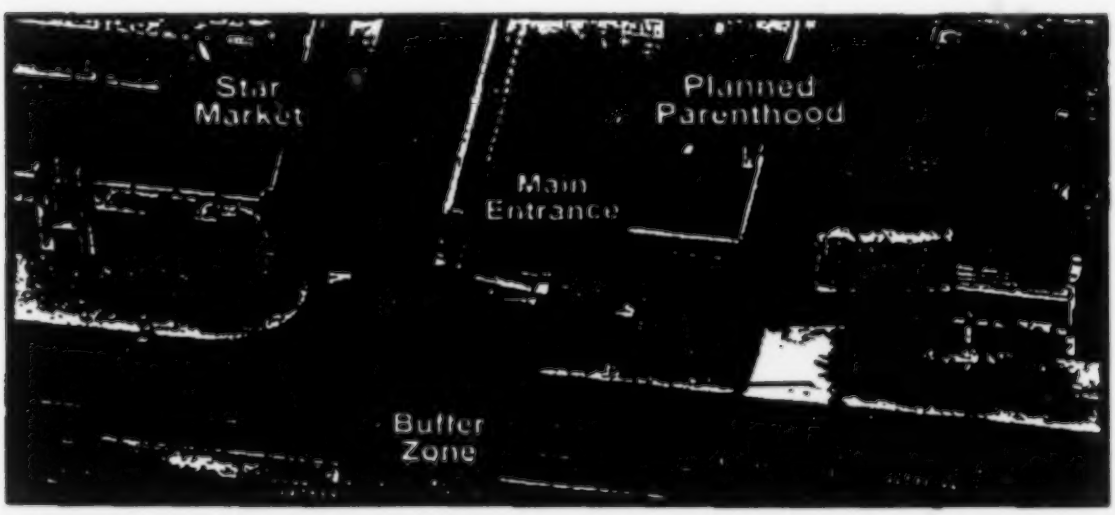
PPFA is a national organization. Its mission is to provide comprehensive reproductive and complementary health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services. PPFA has 69 local affiliates, one of which is PPLM. PPFA affiliates operate over 700 health care centers throughout the country. One out of every five women in the United States has received care from Planned Parenthood. Several Planned Parenthood centers in addition to PPLM's have been also subjected to violent and obstructive conduct that has prompted the enactment of regulations that seek to balance public safety with the rights of protesters around the country.

STATEMENT OF FACTS

I. The Boston, Worcester, and Springfield Facilities

PPLM operates the three Reproductive Health Care Facilities ("Facilities") that petitioners target in their challenge to the 2007 "Act Relative to Public Safety" (the "Public Safety Act"). As discussed in Section II below, PPLM's Boston, Worcester, and Springfield Facilities were subject to violence and congestion in the years preceding the Act. To assist the Court in visualizing these locations, *amici* have attached graphics showing the buffer zones in relation to the buildings, streets, private property and sidewalks at each location. *See* Appendix ("Appx.") at 8a-10a.

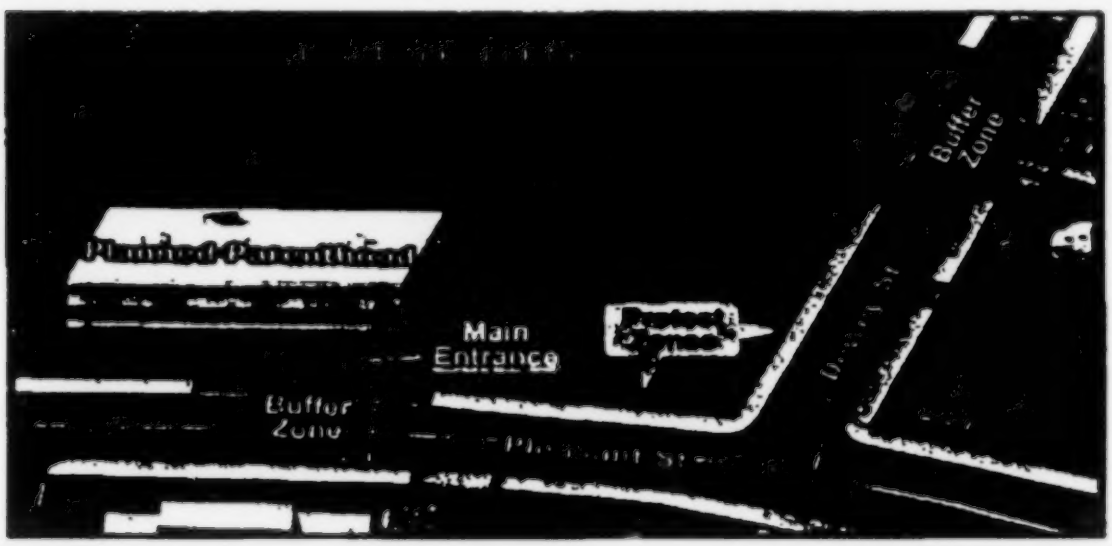
Boston Facility: Front Entrance



The Boston Facility, *see* Appx. at 8a (full graphic), is located at 1055 Commonwealth Avenue, J.A. 293, in a densely populated retail shopping

district. Commonwealth Avenue is a two-way street, with subway tracks running down the center and multiple travel lanes on each side. The sidewalk is approximately 25 feet wide. J.A. 294. A busy supermarket is immediately across a side street, Alcorn Street, and the neighborhood is on the edge of the Boston University campus. All patients and many employees enter through the front entrance of the Boston Facility on Commonwealth Avenue, which is recessed about twelve feet from the front of the building. J.A. 293-94. The Facility also has a rear garage entrance not used by patients. *Id.* Both entrances have buffer zones indicated by painted arcs and signs.

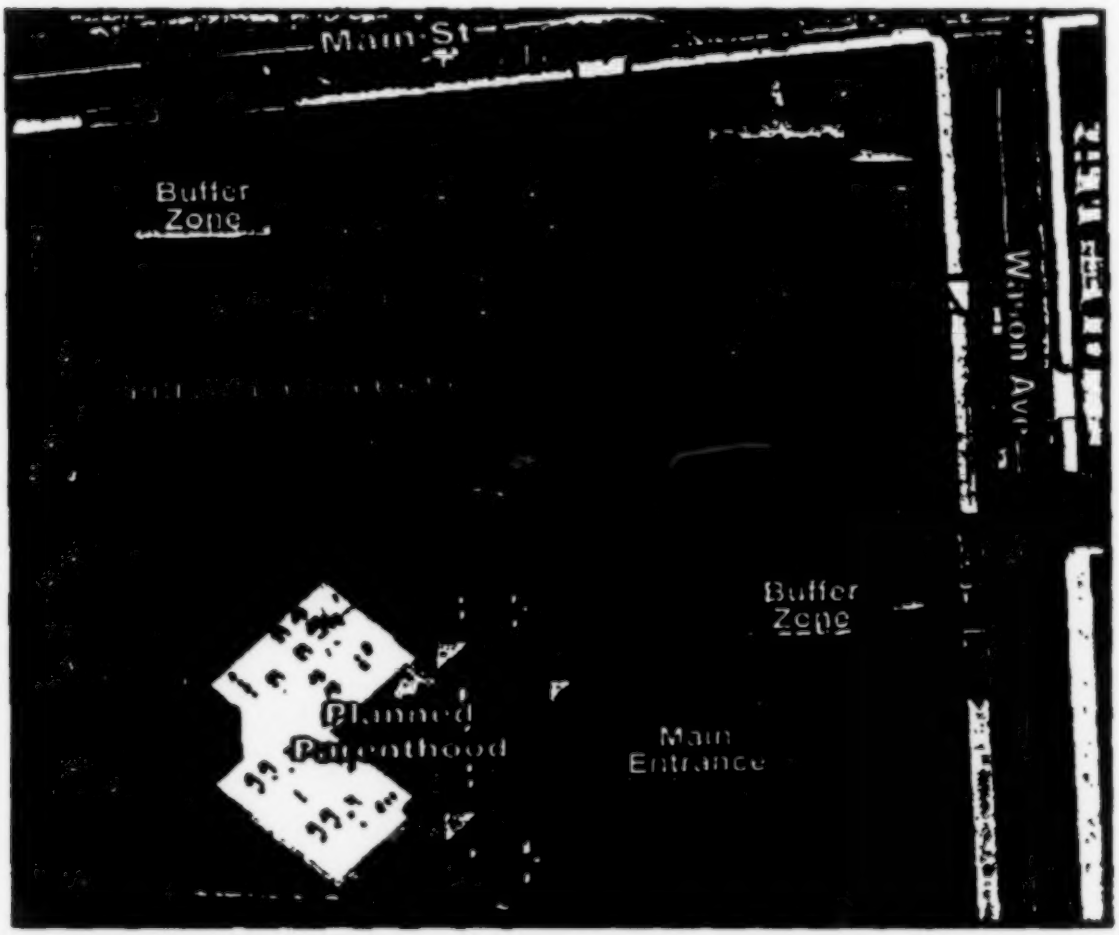
Worcester Facility



Since 2009, PPLM's Worcester Facility, *see* Appx. at 9a (full graphic), has been located in downtown Worcester. Its front door is approximately fifty feet from the sidewalk and is accessed from the street by a walkway passing through two fences located about

40 feet from the door. J.A. 295. There is also a driveway entrance on a side street. Both entrances are protected by marked and posted buffer zones. *Id.*

Springfield Facility



PPLM's Springfield Facility, *see* Appx. at 10a (full graphic), is housed in a three-building medical complex situated among parking lots. Several unrelated medical businesses are housed in the same complex. J.A. 297. The doorways of the Facility are several hundred feet from public roads. *Id.* Of the five driveway entrances to the surrounding parking areas, all have painted lines but only two are posted

under the statute. J.A. 297-98; M.G.L. ch. 266, § 120E1/2(c).

II. The Decades-Long History of Violence and Harassment At PPLM's Facilities

This case arises against a backdrop of decades of harassment, intimidation, obstruction, and violence directed at staff, patients, and volunteers at PPLM's Facilities. Those seeking to prevent individual patients from entering PPLM's Facilities have posed an ongoing risk to the safety of PPLM staff, members of the general public who must traverse the streets and sidewalks on which PPLM's Facilities are located, and patients, the majority of whom are seeking routine preventive health care and not abortion services.

A. Violent and Obstructive Behavior Before Enactment of the 2000 Buffer Zone Law

In the late 1980s, PPLM became one of the earliest targets of invasions and blockades by Operation Rescue, an organization dedicated to curtailing access to abortion. Hundreds of Operation Rescue protesters physically blockaded PPLM's Facilities, including one then located in Brookline, Massachusetts, a town adjacent to Boston. (PPLM's Boston Facility is the successor to the Brookline Facility.) Protesters lay on the ground in front of Facility entrances and entered them to block examination rooms. They chained themselves to each other, to doors, and to fixtures inside operating rooms. Operation Rescue once sent 75 decoys to one

Facility in an attempt to draw police away from the nearby entrance to another. *See PPLM v. Operation Rescue*, 550 N.E.2d 1361, 1363-64 (Mass. 1990); *PPLM v Blake*, 631 N.E.2d 985, 989 (Mass. 1994). On several occasions, the Brookline Police were forced to arrest up to 200 protesters. *See, e.g.*, Sara Rimer, *Brookline Shows Fervor In Keeping Clinics Open*, N.Y. Times, Jan. 3, 1995, at A12.

In October 1991, PPLM obtained a permanent injunction against Operation Rescue, William Cotter and others. *See Operation Rescue*, 550 N.E.2d at 1371 (affirming preliminary injunction); *Blake*, 631 N.E.2d at 994 (affirming permanent injunction). Massachusetts courts also issued injunctions prohibiting specific individuals from engaging in violent harassment and intimidation at the Facilities. *See, e.g., PPLM v. Bell*, 677 N.E.2d 204 (Mass. 1997) (affirming 1994 injunction); *Commonwealth v. Manning*, 673 N.E.2d 73 (Mass. App. Ct. 1996) (affirming conviction for violating 1991 injunction); *Commonwealth v. Filos*, 649 N.E.2d 1085 (Mass. 1995) (affirming conviction for violating 1991 injunction); *Commonwealth v. Cotter*, 612 N.E.2d 1145 (Mass. 1993) (affirming conviction for violating 1990 injunction); *Commonwealth v. Brogan*, 612 N.E.2d 656 (Mass. 1993) (affirming conviction for violating 1990 injunction); *see also PPLM v. Operation Rescue*, No. 89-2487-F (Mass. Super. Ct. Oct. 17, 1991) (permanent injunction enjoining 66 individuals and three entities).

On December 30, 1994, John Salvi went on a shooting rampage in two Facilities in Brookline. Salvi killed a PPLM employee, Shannon Lowney,

and an employee of another abortion provider, and injured five other people. J.A. 57-59; *see also* Beth Daley, *Shootings Renew Women's Anxiety*, Boston Globe, Jan. 1, 1995, at 1. The protesters outside PPLM's Brookline Facility had labeled twenty-five-year-old Lowney – the receptionist and Spanish translator at the center – "Public Enemy #1" because she was the person who opened the doors each day. J.A. 58. *See* National Abortion Federation, History of Clinic Violence, http://www.prochoice.org/about_abortion/violence/murders.asp (last visited Nov. 20, 2013) (describing history of murders and shootings at Facilities).

After the issuance of a permanent injunction against Operation Rescue, the protesters modified their tactics, initiating a campaign of harassment targeted at anyone entering or leaving the Facilities. Protesters would stand "shoulder to shoulder" verbally abusing patients. They would "walk[] in front of them thrusting literature or graphic pictures in their face." J.A. 14, 15. One staff member recalled an instance where three protesters stood in a row, blocking the entrance and forcing the staff member to "squeeze between them" to enter the building. J.A. 16-17.

Protesters also harassed the companions of patients, including children and elderly people. Protesters in Boston once "engulfed" a taxi that had pulled up at the curb, trapping a young woman and her grandfather inside. J.A. 21-22. When the two managed to extricate themselves from the cab, the protesters shoved the grandfather, who walked with a cane. J.A. 21-22.

This incident was not the only time when patients or staff who arrived at the Boston Facility by car were subjected to harassment and obstruction. Protesters surrounded the car of PPLM's medical director, screaming out her name, calling her a murderer, and targeting her with an explicit death threat. J.A. 12.

The situation was no better at PPLM's Worcester Facility, where protesters vandalized the Facility, smashed windows, threatened patients and staff arriving at the Facility, and made bomb threats. Protesters punched and surrounded cars and blocked access to the garage card reader. J.A. 18-20. They blockaded the driveway, obstructing access to the parking lot and impeding the flow of traffic. J.A. 18. This activity caused at least one accident. J.A. 19. The Worcester Police repeatedly removed blockading protesters from the facility's driveway. J.A. 18-19.

The Springfield Facility has also been a target of aggressive protest. The Springfield Facility, which shares a building with other medical providers, is surrounded by private parking lots. J.A. 197, 297. In the 1990s, protesters intruded into the parking lot to prevent staff and patients from entering the building. They also stood in the driveway, attempting to drop pamphlets through the open windows of moving cars.

The harassment and abuse of patients outside of PPLM's Facilities caused patients to experience stress, anxiety, and fear. J.A. 15, 23-24, 86. There is abundant evidence in the medical literature that a patient subjected to emotional stress right before

surgery is at risk for increased physical pain or other complications. *See, e.g.*, Guy H. Montgomery, et al., *Presurgery Psychological Factors Predict Pain, Nausea, and Fatigue One Week After Breast Cancer Surgery*, 39(6) J. Pain & Symptom Mgmt. 1043 (2010); Paula M. Trief, et al., *A Prospective Study of Psychological Predictors of Lumbar Surgery Outcome*, 25(20) Spine 2616 (2000); Aleksander Perski et al., *Emotional Distress before Coronary Bypass Grafting Limits the Benefits of Surgery*, 136(3), Am. Heart J. 510 (1998). These risks are especially acute for patients who are already distressed and grieving following miscarriages of wanted pregnancies.

B. Enactment of the 2000 Buffer Zone Law

In response to the widespread violence, harassment, and intimidation at the Facilities, the Massachusetts legislature held hearings on a bill to establish a buffer zone around Facility entrances and driveways. *See* An Act Relative to Reproductive Health Care Facilities, S.148, 181st Gen. Ct. (Mass. 2000); *Buffer Zones: Havens for Women or Impediments to Free Speech?*, State House News Service ("SHNS"), April 15, 1999. Witnesses testified about the violent and aggressive protests that plagued the Facilities, "the emotional and physical vulnerability of women seeking to avail themselves of abortion services," and "the deleterious effects of overly aggressive demonstrations on patients and providers alike." *McCullen v. Coakley* ("*McCullen I*"), 573 F. Supp.2d 382, 387 (D. Mass. 2008); *see* J.A. 12-24 (excerpts of the written testimony submitted to the committee).

Law enforcement officers testified that existing criminal laws were inadequate to maintain the peace around the Facilities. *See, e.g.*, SHNS, April 15, 1999.

The bill that advanced out of committee received broad bipartisan support in the legislature, including from legislators who opposed abortion but backed the measure as a matter of public safety in what had become "war zones." *See* Massachusetts House Journal Supp., 181st Gen. Ct. (July 28, 2000) (passing 107-48); Massachusetts Senate Journal, 181st Gen. Ct. (February 29, 2000) (passing 27-12); Letter from Representative Angelo, et al., to Thomas Finneran Speaker of the Massachusetts House of Representatives (June 29, 2000), http://www.massnews.com/past_issues/2000/7_July/julbu2.htm (last visited Nov. 20, 2013) (noting that bill was supported by House members opposed to legal abortion). The bill had the support of the Massachusetts Attorney General, several district attorneys and police chiefs, SEIU Local 285, the Massachusetts Nurses Association, the Massachusetts Medical Society, and several dozen other community organizations, as well as "80% of Massachusetts residents." *Id.*

After passage of the Act Relative to Reproductive Health Care Facilities (the "2000 Act"), Republican Governor Paul Cellucci signed it into law. Mass. St. 2000, ch. 217. The 2000 Act created an 18-foot fixed buffer zone around entrances to the Facilities. Within the zones, no person could "knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such

other person or occupant of the vehicle consent[ed]." *Id.*

A group of three protesters (including one of the petitioners here) unsuccessfully challenged the constitutionality of the 2000 Act. *McGuire v. Reilly* ("*McGuire I*"), 260 F.3d 36 (1st Cir. 2001) *McGuire v. Reilly* ("*McGuire II*"), 386 F.3d 45 (1st Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

C. Protests After Enactment of the 2000 Buffer Zone Law

After the 2000 Act took effect, protesters again modified their tactics. Instead of "approach[ing]" patients and staff in violation of the statute, they simply stood as a body near the Facility entrances and did not move, requiring patients and staff to pass by or through a knot of protesters to enter. Thus, aggressive, intimidating, and obstructive protests continued. *See* J.A. 73, 99, 123.

At the Boston Facility, protesters and counter-protesters (supporting the right to choose abortions) gathered outside the Facility's entrance on the second Saturday of each month. J.A. 27. Those seeking to discourage abortions would focus on identifying prospective patients and then "dog them" until they reached the buffer zone. J.A. 28-29. They sought to "prevent people from entering the clinic" and "antagonize[d] everybody coming in." J.A. 72, 86-87. Four protesters stood on the curb so that patients could not exit vehicles that had pulled up to the street entrance. J.A. 86. Inside the buffer zone, the protesters positioned themselves and their signs

to impede people attempting to enter the facility. J.A. 44, 123-24. Protesters inside the buffer zone and within six feet of patients screamed at patients through megaphones, but without ever "approach[ing]." J.A. 96.

One group of pro-choice counter-protesters, the "Pink Group," pushed and shoved others inside the buffer zone to get a good position. J.A. 123. At times, the jockeying among protesters and counter-protesters inside the buffer zone culminated in fist fights. *See* Michele McPhee, *Abortion Clinics Lack Real Buffer*, Boston Herald, Jan. 15, 2007, at 4.

Protesters attempted to force literature into the hands of unwilling recipients. J.A. 44. Other protesters at the Boston Facility wore Boston Police Department hats and shirts and stationed themselves, carrying clipboards, at the garage entrance. J.A. 98, 124. They demanded contact information from people trying to get into the building. J.A. 62. These protesters persisted in this intimidating and deceptive conduct despite several arrests. J.A. 71.

When it rained, "umbrella wars" erupted, with protesters using umbrellas to "knock [volunteer patient] escorts out of the way." J.A. 44-45, 85. Protesters spit at escorts while they were assisting patients to the Facility entrance. J.A. 44. The area in front of the pedestrian entrance of the Boston Facility was still a free-for-all. J.A. 69. "[M]ale companions of the patients [would] enter into verbal confrontations" with the protesters, and protesters

and patient companions jostled each other. J.A. 123, 127.

At the Worcester Facility, one protester would stand in the middle of the driveway to block cars from entering the parking lot. J.A. 99. Protesters at the Springfield Facility also blocked cars from entering the Facility's parking lots. J.A. 118-19. PPLM continued to spend over $300,000 each year on security across its Facilities to keep patients, staff, and volunteers safe. J.A. 60-61.

Because the 2000 Act prohibited only "knowing[] approach[es]," the police encountered obstacles to enforcement. *See* J.A. 69, 96, 126. The police commander in charge of the area in which the Boston Facility was located testified that "what an approach is is very hard to determine .... Basically, it turns us into basically something like ... a basketball referee down there, where we're watching feet, we're watching hands." J.A. 67. Protesters found that they could violate the law with impunity. As a result, patients, staff, and passersby confronted the same safety risks outside of Facility entrances and driveways as they had before the law was enacted. J.A. 96.

D. Enactment of the 2007 Public Safety Act

In 2007, legislators introduced Senate Bill 1353, "An Act Relative to Public Safety," to create a fixed buffer zone within a 35-foot radius from the entrance to a Facility. The Legislature's Joint Committee on Public Safety and Homeland Security received

testimony from police that the 2000 Act had not succeeded in stopping threatening and obstructive tactics. Boston Police Captain William D. Evans testified, for example, that police had "tried everything," and that the only thing that would keep patients safe was "to establish a fixed zone" because "[t]hat way there's no watching feet, watching hands, and allowing protesters up in their face." J.A. 69-70.

"An Act Relative to Public Safety at Reproductive Health Care Facilities" ("Public Safety Act" or "Act") passed with bipartisan support – including from legislators opposed to abortion – on November 8, 2007. *See, e.g.*, Massachusetts House Journal Supp., 185th Gen. Ct. (Nov. 1, 2007) (identifying 122 legislators who voted for Act and 28 who voted against). *Compare id. with* Appx. at 4a-7a (excerpts and key from NARAL Legislative District Analysis analyzing views of members of Massachusetts House; showing that 14 supporters of the Act opposed abortion while 15 had "mixed" views"). *See* Chapter 155 of the Acts of 2007 (codified as amended at M.G.L. ch. 266, § 120E1/2 (2007)).

E. Success of the Public Safety Act

The Public Safety Act has succeeded where earlier efforts failed. Protests and communication outside the Facilities continue, but no longer at the expense of public safety and Facility access. For example, the "atmosphere outside the [Boston] clinic has been much more orderly," with "fewer confrontations between protesters and people walking to the clinic." J.A. 126.

Protesters are still present at all three PPLM Facilities. In Boston, protesters are present daily. Petitioners continue to distribute flyers and other literature. J.A. 181. On the second Saturday of each month, thirty to forty protesters congregate outside the Boston Facility. J.A. 191. Any patient entering the Facility must pass by the protesters standing at the perimeter of the buffer zone.

In Worcester and Springfield, most patients still arrive by car and enter private parking areas through driveways. But protesters, including petitioners Shea, Clark, and Bashour, continue to speak, pray, and hold signs at the parking lot fences, along the street, and opposite the driveways. In addition to several year-round "regulars," as many as 100 people gather outside the Worcester Facility for the semi-annual "40 Days for Life" protests. J.A. 229-30. Petitioner Shea identified twenty people who protest at the Springfield Facility. J.A. 206-13. Patients sometimes walk from the parking lot to the protesters to speak or receive literature. J.A. 213, 223-24, 227, 256.

"Sidewalk counsel[ors]" such as petitioners, Pet.Br. at 9, continue to work alongside more aggressive and intimidating protesters, supplementing the tactics of other protesters with public prayer and what they characterize as "peaceful," "gentle" and "quiet" communications with patients. *See, e.g.*, Pet.Br. at i, 11, 40, 51; J.A. 133.

The Public Safety Act has not prevented petitioners from conveying their messages to patients. Petitioner McCullen testified that, during

the three-and-one-half years after the current law went into effect, she persuaded eighty women not to terminate their pregnancies. J.A. 148. Petitioner McCullen works with William Cotter of Operation Rescue, reporting to him when she has successful interactions with prospective patients. J.A. 142. Petitioner Cadin estimated that during this same period, he persuaded more than ten women not to have an abortion. J.A. 172. Petitioners Clark and Bashour testified that their activities at the Worcester Facility had dissuaded approximately ten women from abortions. J.A. 227, 230, 255, 261.

Each petitioner believes that she or he has a unique message or approach and would like to stand very near to a Facility's entrance to convey that message most effectively. J.A. 133, 163, 176, 189, 200, 217. All seek to be in close proximity to patients, including, in petitioner McCullen's case, to "put her arms around" patients. J.A. 146. In addition to Ms. McCullen's own efforts, other protesters – whom she described as "disruptive," "over the top," and "counterproductive" – continue to be present. J.A. 149-50.

Without the Act, petitioners, along with colleagues they deem "disruptive," *id.*, would again be competing for the space immediately outside Facility entrances and driveways, preventing safe access.

III. The Use of Escorts at the Boston Facility

Many patients are accompanied to PPLM Facilities by spouses, children, parents, or friends.

Some of these companions have entered into physical conflict with protesters while trying to shield patients. J.A. 95-96, 127. In the fall of 1988, PPLM began asking volunteer escorts to help patients and their companions find their way past the gauntlet of protesters to the entrance of the Brookline (now Boston) Facility on busy Saturdays.

PPLM uses escorts only at the Boston Facility, and only on Saturday mornings. C.A.App. 490.[2]

Escorts receive training in how to assist patients to enter and exit the Facility safely. *See, e.g.*, Appx. 1a-3a (excerpts from escort training Powerpoint presentation). Escorts are trained to stand outside the buffer zone. When a prospective patient asks for or seems to need assistance, an escort greets her and asks whether she would like to be escorted. If the patient requests assistance, the escorts will typically bring her to the edge of the buffer zone or, if further assistance is needed, accompany the patient to the door of the building, open the door, and return to the area outside the buffer zone.

PPLM emphasizes that not all patients need or want escorts. *See id.* at 1a-3a; *cf.* J.A. 103 (PPLM's security contractor never personally observed an escort accompany a patient through the buffer zone). If the patient declines assistance, the escorts do not interact further with her. Escorts are prohibited from interrupting any conversation between a

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[2] "C.A.App." refers to the Joint Appendix filed in the First Circuit in *McCullen v. Coakley* ("*McCullen II*"), 708 F.3d 1 (1st Cir. 2013).

patient and a protester. Appx. at 2a. Their training is designed to ensure that they respect each patient's choices about whether and how to enter the building.

Escorts are trained not to engage with protesters or discuss protesters' comments with any patient. *Id.* They are also prohibited from taking or asking to take away leaflets, flyers, or other material from any patient who wants to retain such materials. *Id.* They are not permitted to express views about abortion, nor can they attempt to counsel a patient concerning an abortion decision. *Id.* Nor, in any event, could escorts assume that the patients they are assisting are contemplating abortion; as noted above, *supra*, p.2, the majority of Facility patients are there to receive preventive health services such as routine gynecological care and cancer screenings.

Petitioners attempt to cast PPLM's escorts as abortion advocates or counter-protesters. This characterization of the escorts is inconsistent with the purpose of the escorts, the training that PPLM provides for them, and PPLM's knowledge of what actually happens outside of the Boston Facility. *See, e.g.*, C.A.App. 490 (role of escorts is to assist patients into buffer zone).

SUMMARY OF ARGUMENT

Decades of violence and obstruction of entrances by protesters at Facilities in Massachusetts persisted notwithstanding arrests, convictions, injunctions, and previous legislative action. The Massachusetts legislature concluded that the best way to ensure public safety and access to the

Facilities, while respecting the First Amendment rights of opponents of abortion, was simply to create a relatively small space in front of the entrances where people may not enter or congregate. The challenged Public Safety Act passed in 2007 with bipartisan support, including the support of legislators opposed to abortion. There is no evidence that the legislature hoped to, or did, quell abortion-related protests.

The Public Safety Act's prohibition on entry into a fixed 35-foot area surrounding Facility entrances during business hours is not a novel regulation. Prohibitions on congregating in front of certain buildings are commonplace. Government office buildings, including, for example Congress and this Court, often limit activity in the areas surrounding their entrances.

The petitioners in this case make two arguments against the content-neutrality of this law. First, they contend that the act is invalid because it only protects the entrances to reproductive health care facilities. But it is precisely those Facilities – and only those Facilities – where the problem existed. It would have made no sense for the legislature to limit entering or congregating in an area in front of every office building or every medical office in the Commonwealth. This law is narrowly tailored to deal precisely with the core public safety problem that existed. The fact that it is not unnecessarily broad is a virtue, not a vice.

The petitioners' second objection is to one of the Public Safety Act's exceptions, which permits

"employees or agents of such facility acting within the scope of their employment" to enter the proscribed area. But with any rules limiting access to areas in front of building entrances, some logistical exemptions are necessary. This exception permits, for example, the clearing of snow from the sidewalk. There is nothing unusual or suspicious about this exception, which is similar to those found in other buffer zone regulations.

Nor does the "employee or agent" exemption have the practical effect of favoring speech on one side of the abortion debate. Petitioners place great emphasis on the use of volunteer escorts who assist patients attempting to access the Boston Facility. These escorts – *who are used only at one location and only on Saturday mornings* – do not invalidate this law. The escorts are specifically instructed not to advocate any message within the buffer zone. If they did, such advocacy would not be within the scope of their employment, as required by the exemption.

Petitioners also argue that the Public Safety Act is not narrowly tailored and fails to leave open alternative channels of communication. Yet the buffer zone instituted by the Act is precisely tailored to address the core problem of blockaded or congested entrances to the Facilities. The Public Safety Act has not limited petitioners' speech in any way except to require that it (like other pedestrian activities) not occur right at the entrances of the Facilities. Outside that small area, petitioners can and do engage in all activities that they engaged in before. When patients are approached, the willing

listeners among them can and do stay to listen, while unwilling listeners proceed to enter the Facility. The First Amendment does not preclude this commonsense regulation.

ARGUMENT

I. The Act is a Content-Neutral Regulation of Conduct that Addresses a Long-Standing Public Safety Problem.

For decades prior to enactment of the Public Safety Act, Massachusetts was plagued by violence, intimidation, and harassment outside the Facilities. An earlier buffer zone law, other general laws, and particularized injunctions all failed to address this critical problem.

Massachusetts responded with the bipartisan Public Safety Act, supported by state law enforcement personnel and by legislators on both sides of the abortion issue. The Act provides that, during business hours:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility ....

M.G.L. ch. 266, § 120E1/2 (2007). On its face, the Act is neutral as to speech; consistent with its public safety purpose, it prohibits congregation, not speech, outside Facility entrances. *Cf. Hill v. Colorado*, 530 U.S. 703, 747-48 (2000) (Scalia, J., dissenting)

(statute is content-based because it singles out oral protest, education and counseling for prohibition within buffer zone).

It is true that as a consequence of the Act's prohibition on congregation outside Facility entrances, the time and place in which people may protest outside the Facilities are incidentally affected. But the Act does not regulate any method of protest or any particular message, whether conveyed by petitioners or by pro-choice protesters like the Pink Group. Because the prohibition is "directed at ... abusive practices and not at any particular message, idea, or form of speech, the regulation is a content-neutral rule." *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 706 (1992) (Kennedy, J., concurring) *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Petitioners challenge the content-neutrality of the Act on two grounds: it applies only to reproductive health care facilities, and it includes an exception for employees and agents. Pet.Br. at 22-32. As shown below, petitioners' challenges are without merit.

A. The Act's Limitation to Reproductive Health Care Facilities is a Neutral and Appropriate Response to the Problem of Obstructed Access to These Facilities.

Petitioners argue that the Act is content-based because it applies only to these Facilities, while the legislature's stated interests in avoiding violence and obstruction apply to every building in

Massachusetts. Pet.Br. at 24. This ignores the historical reality in Massachusetts, as well as the nature of the Act. Only Facilities such as PPLM's have been plagued by violence and obstruction of access despite injunctions, arrests, and prior legislation.

The legislature responded to these problems by enacting a narrowly tailored buffer zone. The Act regulates obstructive and dangerous conduct, clearing doorways and driveways for safe passage. It applies only to the Facilities because the problem and the risk to public safety addressed by the Act are only presented in these locations. Were other locations to become targets for the kinds of harassment routinely deployed at the Facilities in question, the legislature should and no doubt would respond accordingly. Nobody should have to endure the threats and harassment that were commonplace at the Facilities prior to enactment of the Public Safety Act.

There is no evidence that Massachusetts selectively permits blockades of other buildings, nor is there any evidence that the Act was motivated by animus toward abortion-related speech. On the contrary, during the legislative process, the Act enjoyed bipartisan support, including from legislators who *oppose* abortion. *Supra*, p. 15. The legislature heard evidence that both anti-abortion protesters and pro-choice counter-protesters were creating problems, and the Act applies equally to all, including counter-protesters such as the "Pink Group." *Supra*, p. 13.

A statute is content-neutral when, as here, it has its origins in a legislative purpose that does not arise from disagreement with the underlying message of particular speech and advances interests unconnected to expressive content. Here, the legislature was concerned with public safety and access to private medical facilities. *Ward*, 491 U.S. at 791. The situation is similar to that in *Ward*, where noise regulations only at a specific park, and not other parks, were justified by that park's proximity to residential areas. *Id.* at 792. Similarly, after the City of Renton determined that adult movie theaters were associated with increased crime, its zoning ordinance governing the location of adult theaters, and no other theaters or buildings, passed constitutional muster. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986). When the Town of Brookfield sought to regulate picketing in residential neighborhoods after receiving complaints, it did not also regulate picketing in front of businesses or government buildings. That ordinance, like the other regulations, did not violate the First Amendment. *Frisby v. Schultz*, 487 U.S. 474, 482-88 (1988).

A statute's constitutionality does not depend upon a showing that the particular conduct being regulated has no association with a particular subject or opinion. *See Ward*, 491 U.S. at 791. In addressing the public safety problems arising from protest outside Facilities, the Act may affect those who wish to protest outside such Facilities. But there is no First Amendment violation in regulating the places where the public may congregate, nor is there discrimination in focusing the legislative

response on the only locations where this public safety issue has arisen. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 762-63 (1994) (upholding buffer zone injunction despite impact on abortion-related protest); *Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

B. The Statutory Exemptions are Logistically Necessary for a Fixed Buffer Zone of General Applicability.

This Court's precedent establishes that a law of general applicability such as the Public Safety Act is less likely to impair free speech than individually tailored injunctions. *Madsen*, 512 U.S. 753, 769-70 (1994) (upholding injunction imposing 36-foot buffer zone around entire property line of facility providing abortions). But it is obvious that a generally applicable buffer zone will lead to nonsensical results unless it includes certain exceptions. Patients and staff must be able to get into and out of the building. Police officers, firefighters, and utility workers must have access to perform their functions. Pedestrians traversing the sidewalk past a Facility must be allowed through the buffer zone. And employees and agents of a Facility must perform tasks essential to the functioning of the Facility, such as maintaining the entryway, clearing trash, and removing snow and ice.

Unsurprisingly, these are exactly the exceptions set forth in the Act, which exempts from the bar on presence within a buffer zone the following:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Mass. Gen. Laws c. 266, §120E1/2(b)(1)-(4).

Petitioners' facial challenge relies heavily on the exception for "employees or agents" (Subsection (b)(2)). But that exception is entirely unremarkable – indeed, it is a foregone conclusion – in the context of a generally applicable bar on presence in or near a Facility entrance. Employees must be able to perform such routine but critical functions as shoveling snow and making repairs. There is simply no evidence that the legislature included the employee exemption to favor one side of a debate, rather than for this obvious and practical reason.

Petitioners' logic also proves too much. Petitioners do not challenge the exemption allowing those entering a Facility to cross the buffer zone

(Subsection (b)(1)), even though people voluntarily entering the building – to obtain health services themselves, or to accompany patients – may hold views opposed to petitioners'. Both exceptions serve "purposes unrelated to the content of expression" and must be "deemed neutral," even though they may have "an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

There is nothing unusual about the employee exception in the Public Safety Act. Regulations that restrict unfettered public access to certain places commonly permit employees and agents of the protected entities to conduct activities in areas from which others are excluded. *See, e.g.*, 40 U.S.C. § 6131 (limiting only "public" travel and occupancy of Supreme Court grounds); 40 U.S.C. § 5103 (same, U.S. Capitol Grounds). Several of the time, place, and manner regulations that keep the peace on this Court's grounds apply only to the public and not to Court employees or others with official business. For example, this Court's Building Regulation Seven, which curtails "demonstration" on the Court's grounds, permits "[t]he Supreme Court [to] ... make exceptions to this regulation for activities related to its official functions." *Supreme Court Building Regulations*, Regulation Seven *available at* http://www.supremecourt.gov/publicinfo/buildingregulations.aspx. And the Marshal may close the grounds of the Court entirely "to the general public" – even while admitting first responders, maintenance workers, and Court employees. *Id.*, Regulation Two. Regulations like these are not content-based.

Employee exceptions are a logical and practical necessity of generally applicable buffer zones. A ruling invalidating the Act because of the employee exception would cast all such generally applicable restrictions into doubt.

C. The Use of Escorts at One Facility Does Not Render the Act Unconstitutional As Applied.

Petitioners' criticism of PPLM's use of escorts – who are present only at the Boston Facility, and only on Saturday mornings – does not provide a reason to invalidate the Act. Petitioners' argument amounts to an as-applied challenge to the content-neutrality of the employee-and-agent exception: petitioners argue that the exception allows PPLM's volunteer escorts a privileged position to broadcast their viewpoint within the buffer zone. But that argument does not stand up to factual or legal scrutiny.

As detailed below, there is simply no evidence of content-based discrimination within the buffer zone. The guidance of the Massachusetts Attorney General specifically forbids such discrimination, explaining that subsection (2) of the Act does not permit Facility employees or agents to "express their views about abortion or to engage in any other partisan speech within the buffer zone." J.A. 90-94. Even without that guidance, however, petitioners have not shown, and the court below did not find, the requisite "pattern of unlawful favoritism." *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

Contrary to petitioners' suggestion, there is nothing nefarious about the escorts who assist patients seeking to enter the Boston Facility on Saturday mornings for a variety of services, including cancer screenings and routine gynecological care. The entrance to that Facility is located on a busy sidewalk directly next to a supermarket, and is recessed approximately twelve feet into the building. *See* Appx. at 8a. Particularly on weekends, with many shoppers and other pedestrians passing by, the Facility entrance can be difficult to locate.

On Saturday mornings in Boston, the escorts function like ushers in a theater: they help people figure out where to go and keep foot traffic moving.

PPLM's escorts are trained not to engage in any form of advocacy. Thus, they do not:

- Interrupt people willingly talking to protesters;
- Force conversation with patients or counsel patients;
- Express any views about abortion or engage in partisan speech;
- Take from patients literature protesters have handed them; or
- Respond to protestors in any way.

Appx. at 2a. Any advocacy within or without the buffer zone is outside the scope of the escorts' duties and contrary to their training.

Notably, PPLM's escorts are stationed *outside* the buffer zone, in an area not regulated by the Act. J.A. 103. They traverse the buffer zone only when a patient requests or seems to need help.[3] In this sense, they perform the same function as the family members, partners, and friends who accompany some patients to the Facilities; they enter the buffer zone briefly at the patient's request, and only at the patient's request.

Outside the buffer zone, escorts are on equal footing with petitioners, except that petitioners are there to engage in expressive activity, while the escorts are trained not to do so. Escorts make contact with patients only to see if they would like assistance. A patient approaching the buffer zone is free to engage in face-to-face conversation with petitioners and turn away from PPLM's Facility, or

---

[3] Petitioners concede in their declarations that the initial contact between escort and patient occurs *outside* the zone; that is where the patient decides whether she wants assistance from an escort or not. *See, e.g.*, J.A.189-90 (averring that escorts "approach the person *outside* the zone and then walk with the person past the buffer line and up to the door of the clinic") (emphasis added); J.A. 166 (alleging that escorts approach *outside* the zone); J.A. 178 (same). In contrast, Petitioners' brief goes well beyond the support found in the record in claiming that the Facilities "regularly station escorts in the exclusion zones." Pet.Br. at 14. The assertion that the practice occurs, or is in any way regular, is wholly unsupported by the citation that petitioners provide for this claim: a single photograph.

to request the assistance of an escort and enter it, or, of course, to enter the Facility on her own. It is entirely the patient's choice to enter the buffer zone or, after entering, to change her mind and leave it. The activities outside the buffer zone, as well as the patient's choice whether or not to proceed through it to the Facility, are entirely unregulated by the Public Safety Act.

Petitioners have made a handful of specific claims of misconduct by escorts, alleging that escorts have prevented petitioners from "placing literature near the hands of potential recipients," or made improper statements to patients. Pet.Br. at 28. Any such activity by escorts would be contrary to their training. And though petitioners do not specify where such conduct is alleged to have occurred, they almost certainly are complaining of activity outside the buffer zone, the only area where petitioners would be in a position to hand literature to patients. Activity *outside* the buffer zone does not bear on the constitutionality of the Public Safety Act.[4]

---

[4] Should the Court find that the transient presence of escorts in the buffer zone at the Boston Facility on Saturday mornings offends the First Amendment, the second exemption should be interpreted to exclude escorts so as to uphold the Act, consistent with the longstanding principle that favors interpreting a statute in a manner that preserves its constitutionality. *See Frisby*, 487 U.S. at 483 (interpreting anti-picketing ordinance to apply solely to picketing in front of a particular residence).

II. The Act is Narrowly Tailored to Protect Important State Interests.

Petitioners concede "the general legitimacy of the state interest in protecting public safety and preventing obstruction, intimidation, or harassment." Pet.Br. at 35; *see also Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 376 (1997). The buffer zone at issue here is precisely tailored to achieve this interest.

This Court need not speculate whether this interest would be achieved "less effectively" without the Act. *Ward*, 491 U.S. at 799. As the record demonstrates, Massachusetts conducted that experiment before enacting the 2000 buffer zone law. *See* Facts, Section II.A. Both before and after the enactment of the prior statute, the Facilities were blockaded and patients, staff, and volunteers at the Facilities were intimidated and harassed. Even when no active blockades were in process, Facility entrances were blocked or congested by a jostling mob of protesters. *Id.* Sections II.A and II.C. The prior statute could not be enforced effectively; the police found that it converted them into referees, "watching feet, watching hands" in a small, crowded area around Facility entrances without the benefit of instant replay. J.A. 67-70. The Act must be judged against the threats, intimidation, harassment, and obstruction that occurred before its enactment.

Petitioners do not propose any alternative means of protecting Facility entrances that has not already failed in practice. Nor is it relevant that petitioners themselves disclaim any intent to engage in violent

or harassing behavior. Because petitioners, together with other protesters, all want to stand in or near the doorways and driveways of PPLM's Facilities, Pet.Br. at 11-13, the public safety issue arises from violent and non-violent protesters alike.

Petitioners argue that the Commonwealth's interest in public safety is adequately served by criminal prohibitions against harassment, blockading, or intimidation, or by individual injunctions against "persistent offenders." Pet.Br. at 36. As shown above, however, *supra*, p.7, countless injunctions and criminal prosecutions failed to resolve the problem of blockaded entrances. Moreover, a state may enact regulations to *prevent* harm. *Cf. Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 458-59 (1978) (upholding "prophylactic measures whose objective is the prevention of harm before it occurs" against First Amendment challenge); *Burson v. Freeman*, 504 U.S. 191, 206-07 (1992) ("undetected or less than blatant acts" may cause the harm the state seeks to prevent "before remedial action can be taken"); *Heffron v. Int'l Society for Krishna Consciousness,* 452 U.S. 640, 654 (1981) (rejecting argument that a state's interest in avoiding congestion in fairgrounds could be served by requiring regulation through "less restrictive means, such as penalizing disorder or disruption").

While a time, place, or manner regulation must be "narrowly tailored," it need not be "the least restrictive or least intrusive means" of serving a legitimate governmental interest. *Ward*, 491 U.S. at 798. Thus in *Heffron*, this Court rejected petitioners'

argument that confining them to a booth was too restrictive. 4[illegible] U.S. at 653.

And once it is established that a buffer zone serves an important interest, its precise dimensions do not raise constitutional questions. As a plurality of the Court observed in *Burson*, 504 U.S. at 210, "[r]educing the [100-foot] boundary to 25 feet ... is a difference only in degree, not a less restrictive alternative in kind .... [I]t takes approximately 15 seconds to walk 75 feet." It takes even fewer seconds to walk the 35-foot zone around the entrances to the Facilities here. The Act is a carefully considered and narrowly drawn response to a critical public safety problem, and that is enough to ensure its validity under this Court's precedent.

III. The Act Leaves Open Adequate Alternative Channels of Communication.

The Public Safety Act leaves petitioners with ample alternative channels of communication. Petitioners remain free to engage in whatever forms of expression they choose – including face-to-face contact and quiet conversation – outside the limited 35-foot perimeter around Facility entrances. And even after patients have declined conversation with petitioners and have entered the zone, petitioners are able to communicate with those patients for the final few seconds of their approach to Facility entrances.

Outside the buffer zone, of course, petitioners remain free to communicate with anyone they please in any manner they wish. Protesters can – and do –

speak quietly or with megaphones, distribute leaflets and handbills, carry signs and symbols, pray, and dress in costume. J.A. 126, 141-42, 149-50, 159, 181, 184, 194, 205-13, 215, 225, 229, 263-64, 288-90, 300, 303-06, 309. Petitioners complain that they are not permitted to speak in conversational tones with willing listeners, but that simply is not true. Nothing in the Act precludes petitioners from approaching patients outside the buffer zone and inviting them to engage in one-on-one conversation. And nothing in the Act precludes patients from accepting that invitation and engaging in "friendly, gentle" conversation with petitioners. Pet.Br. at 11. Whether petitioners are able to persuade patients to discuss their health needs and choices with them is entirely up to the patients; nothing in the Public Safety Act makes that decision for them or prevents any willing listener from engaging with petitioners in petitioners' preferred manner.

Even unwilling listeners are fully reachable. Patients do not parachute into the buffer zone – they must cross the line establishing the zone. And until a person crosses that line, the Act has no effect; petitioners may approach patients at close quarters and speak to them however they wish. It is no fault of the law when the protesters' targets elect to cross the buffer zone line.

Even then, petitioners can continue to communicate with unwilling listeners using signs, costumes, vocalization, and amplification, all readily seen or understood from inside the buffer zone. The Act prohibits only the physical act of following a patient all the way to a Facility door. *See Schenck,*

519 U.S. at 380-31 (upholding injunction provision that prohibited sidewalk counselors from following and crowding patients all the way to clinic door). This prohibition restricts only the proximity of communication, and for only about the last seven seconds before a patient enters the Facility. *See Burson*, 504 U.S. at 210 (approving buffer zone of 75 feet around polling places as affecting only last 15 seconds before entry). In any event, as this Court has observed, "no one has a right to press even 'good' ideas on an unwilling recipient." *Hill v. Colorado*, 530 U.S. 703, 716-18 (2000) (collecting cases) *quoting Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970).

Petitioners' specific arguments regarding the Worcester and Springfield Facilities, which are reached by cars entering private parking lots, are unavailing. Before passage of the Act, protesters in Worcester and Springfield blockaded Facility driveways, approached moving cars in an effort to distribute literature, and otherwise obstructed access to Facility parking lots. *Supra*, pp. 9, 14; J.A. 99, 118-19. The interaction of protesters on foot and patients in moving cars created an obvious and critical safety risk; as in *Schenck*, the legislature could conclude that the Act was necessary "because of the dangerous situation created by the interaction between cars and protesters." 519 U.S. at 376.

As applied in Worcester and Springfield, the Act merely prohibits petitioners from obstructing access to driveways and approaching cars at close proximity. Nothing prevents petitioners from broadcasting their message in numerous ways along

the substantial remaining stretches of sidewalk that abut the Facilities and line the roads by which the Facilities are approached. *See* Appx. at 9a, 10a. And indeed, at both locations, protesters carry signs, sing and chant loudly, use sound amplification devices, and distribute literature. J.A. 205-13, 215, 225, 229, 235-38, 263-64.

Petitioners' own testimony shows that they have enjoyed substantial success in reaching listeners at all three of PPLM's Facilities and delivering their messages persuasively. Petitioner McCullen testified that in the first three and a half years after the passage of the Act, she dissuaded approximately eighty women from abortion. J.A. 147-49. Other Boston protesters also reported success in their efforts. J.A. 172. In Worcester and Springfield, some patients arriving by car walked out of the parking lot and to the protesters to speak or receive literature. J.A. 213, 223-24, 227, 256. Some of the petitioners also testified that they or others had succeeded in dissuading several women in Worcester from having abortions. J.A. 227, 230, 256, 260-61, 265.

Despite the demonstrated adequacy of alternative channels of communication, petitioners insist that the First Amendment entitles them to more – in essence, to the most effective method of reaching the maximum number of possible listeners. But that argument is foreclosed by this Court's precedents. *See, e.g., Ward*, 491 U.S. at 802 (adequate alternatives existed even though restrictions prevented use of the most effective sound amplification equipment and reduced the potential

audience); *Renton*, 475 U.S. at 53-54 (alternative channels of communication were adequate, even though adult movie theaters were entirely foreclosed from operating in 95% of the city). The First Amendment "does not guarantee the right to communicate one's view at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. Petitioners can say anything they want, in any manner they want, as long as they stay 35 feet away from Facility entrances. *See Frisby*, 487 U.S. at 483 (ordinance banning picketing targeted at residences left adequate alternative channels of communication because it still "permit[ted] the more general dissemination of a message").

CONCLUSION

Amici respectfully urge the Court to affirm the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

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PLANNED PARENT LEAGUE OF MASSACHUSETTS CLINIC ESCORT TRAINING, POWERPOINT PRESENTATION

PPLM

Clinic Escort Training

* * *

Remember . . .

- Escorting is not for everyone. **It is imperative that Escorts remain calm and non-confrontational at all times.** If you are unable to follow these protocols, please let us know. There are many other ways for you to volunteer or become involved with PPLM.

* * *

Patients and Companions

- Each woman's reaction to having an abortion is different.
- Do not try to counsel patients.
- Do not be surprised or offended if a patient reacts negatively.
- Focus on patients, but be prepared to assist companions as well.

* * *

Clinic Escorts and Protesters

- Do not respond to the protesters in any way. If you find yourself feeling confrontational, take a minute inside.
- Never make physical contact with protesters.
- Do not interrupt people willingly talking to protesters.
- Do not discuss protesters with patients, staff, or other Escorts while on duty.
- If a protester acts illegally, let the Escort Captain know immediately.

* * *

DO NOT:

- Block entrances by gathering with other escorts.
- Force conversation with a patient or attempt to counsel a patient.
- Touch a patient, unless she gives you permission.
- Express any views about abortion or engage in partisan speech.
- Take anti-choice literature from a patient.
- Talk to the media.
- Acknowledge that you know a patient that you recognize from elsewhere, or acknowledge a

patient you later encounter unless she approaches you first.

- Greet an escort by name.

MASSACHUSETTS HOUSE MEMBERS WHO VOTED FOR THE PUBLIC SAFETY ACT AND DO NOT HAVE A PRO-CHOICE VOTING RECORD – Excerpts from Legislative District Analysis prepared by NARAL Pro-Choice Massachusetts

Legislative District Analysis, 2007-2008 Session

MASSACHUSETTS HOUSE

District Town	Representatives	+Pro/ Anti	Party
6th Worcester Charlton	Geraldo Alicea	O	D
	* * *		
1st Bristol Mansfield	Fred Barrows	–	R
17th Worcester East Worcester	John Binienda	–	D
	* * *		
31st Middlesex Winchester	Paul Casey	O	D
	* * *		
11th Plymouth Brockton	Geraldine Creedon	–	D
	* * *		
3rd Worcester Fitchburg	Stephen DiNatale	–	D
	* * *		
1st Worcester Holden	Lewis Evangelidis	O	R
	* * *		

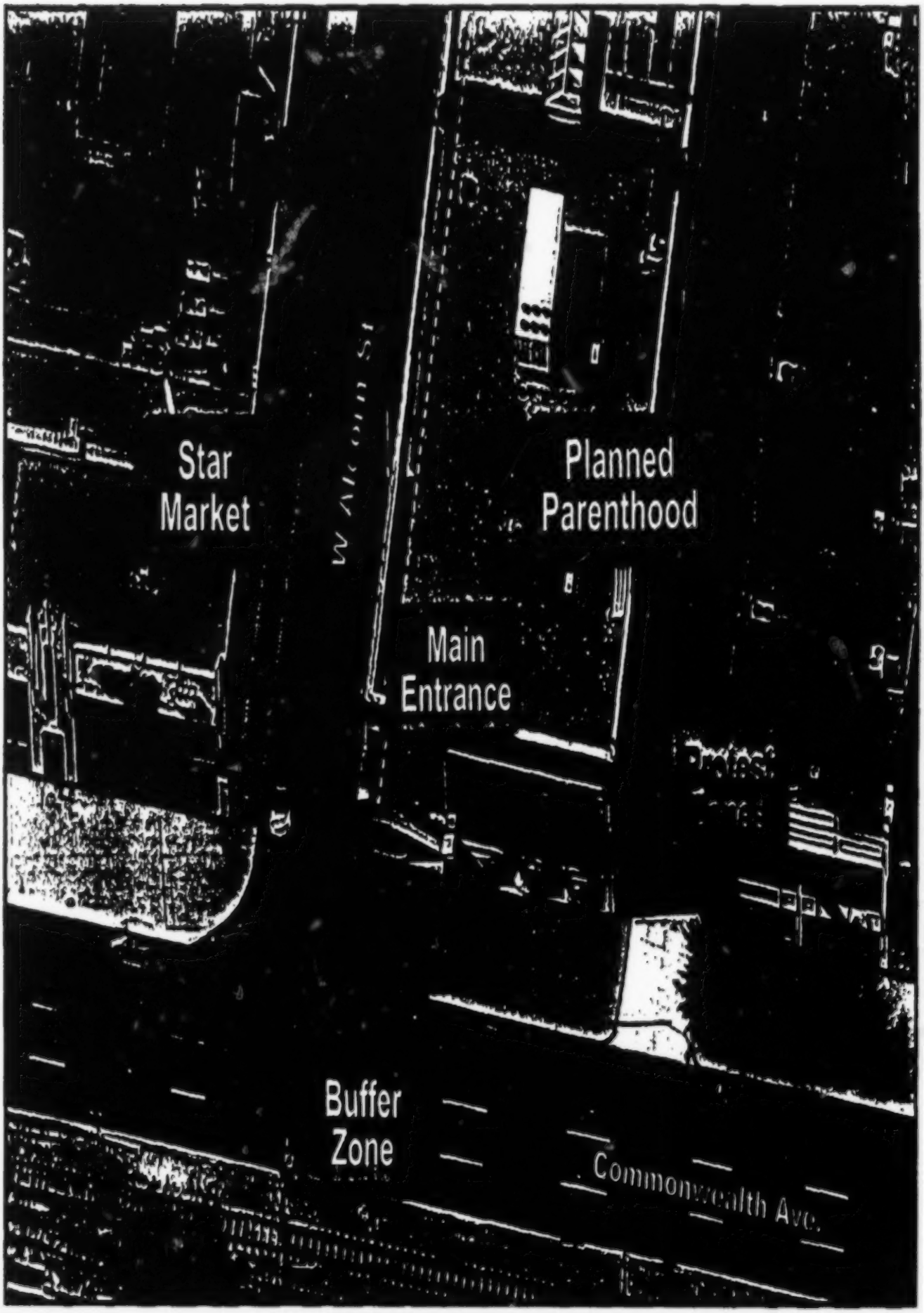
10th Essex Lynn	Robert Fennell	O	D
10th Worcester Milford	John Fernandes	O	D
	* * *		
16th Middlesex Lowell	Thomas Golden	–	D
	* * *		
13th Norfolk Needham	Lida Harkins	O	D
4th Essex Ipswitch	Bradford Hill	O	R
	* * *		
20th Middlesex North Reading	Bradley Jones	O	R
	* * *		
9th Plymouth Brockton	Thomas Kennedy	–	D
	* * *		
11th Bristol New Bedford	Robert Koczera	–	D
	* * *		
8th Worcester Webster	Paul Kujawski	–	D
	* * *		
16th Essex Lawrence	William Lantigua	–	D
4th Middlesex Marlborough	Stephen LeDuc	O	D
	* * *		
18th Middlesex Lowell	Kevin Murphy	O	D

17th Middlesex Lowell	David Nangle	–	D
	* * *		
5th Plymouth Hanover	Robert Nyman	–	D
	* * *		
15th Worcester Worcester	Vincent Pedone	O	D
	* * *		
7th Hampden Ludlow	Thomas Petrolati	–	D
	* * *		
8th Bristol Westport	Michael Rodrigues	–	D
	* * *		
12th Norfolk Norwood	John Rogers	–	D
	* * *		
9th Middlesex Waltham	Tom Stanley	O	D
	* * *		
26th Middlesex Cambridge	Timothy Toomey, Jr.	O	D
	* * *		
5th Essex Gloucester	Anthony Verga	O	D
8th Hampden Chicopee	Joseph Wagner	O	D
	* * *		

Key and Count		House
+	**Pro-Choice** Legislator	88
–	**Anti-Choice** Legislator	40
O	**Mixed** Legislator	20
?	No Response	11
N/A	Vacant Seat	1
Total Number of Legislators		**160**

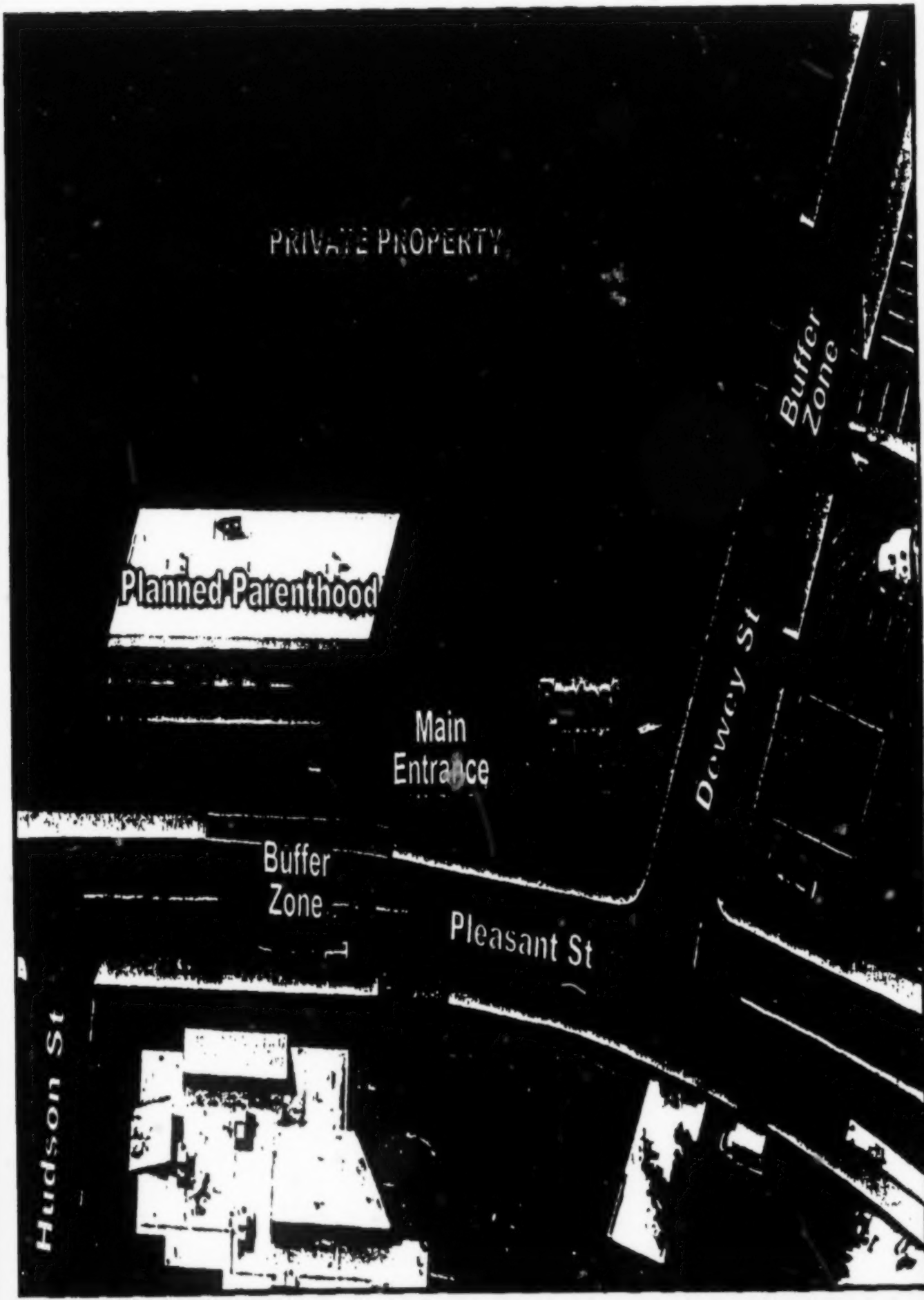
PPLM Boston Facility: Front Entrance

1055 Commonwealth Ave. Boston, MA



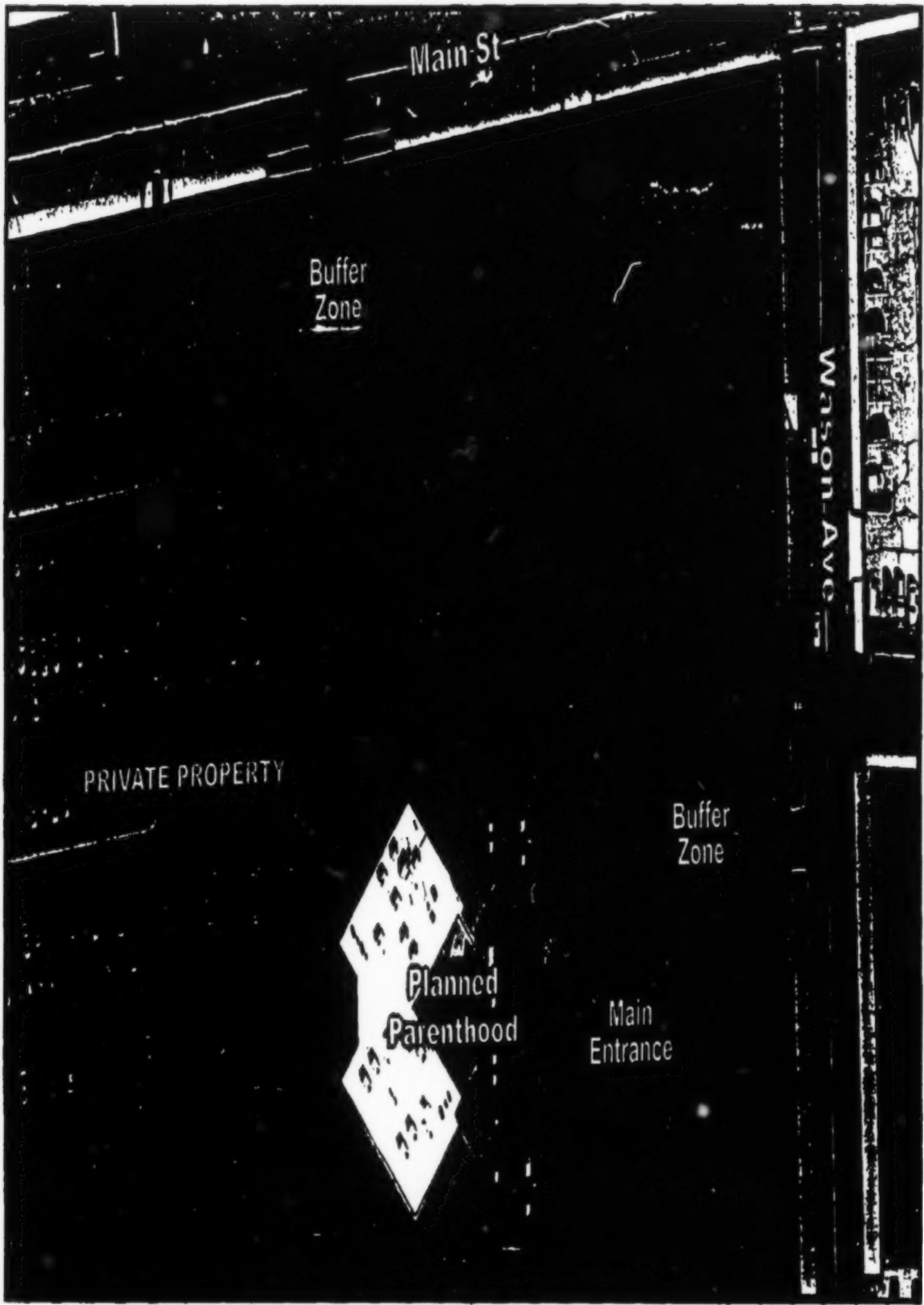
PPLM Worcester Facility

470 Pleasant St. Worcester, MA



PPLM Springfield Facility

3550 Main St. Springfield, MA



AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1168

Supreme Court, U.S.
FILED
SEP 16 2013
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In The
Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,
Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Circuit erred in upholding Massachusetts's selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to Petitioners.

2. Whether, if *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, *Hill* should be limited or overruled.

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Another New England state considers buffer zone law around abortion clinic, 22 News, July 31, 2013, http://www.wwlp.com/news/massachusetts/another-new-england-state-considers-buffer-zone-law-around-abortion-clinic 8

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).[2] One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the constitutional right of citizens to engage in freedom of speech, expression, and assembly on the nation's public sidewalks.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

Once again, this Court is confronted with an abortion "buffer zone" statute that evinces a sweeping disregard for the constitutional rights of Petitioners and their intended audience, and goes far beyond what this Court has previously held to be permissible regulation. In this case, the State of Massachusetts has made it a crime – with a punishment of up to two-and-one-half years' incarceration[3] – for individuals to "enter or remain on a public way or sidewalk" within 35 feet of the entrance, exit, or driveway of a "reproductive health care facility."[4] Mass. Gen. Laws ch. 266, § 120E½(b). Respondents' purported justification for the 2007 Statute is that it is necessary to protect the State's interest in ensuring unimpeded and harassment- and intimidation-free access to abortion clinics. When the history leading up to the enactment of the 2007 Statute is examined, however, Respondents' position crumbles, as the record contains little to no evidence that individuals attending abortion clinics

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[3] Mass. Gen. Laws ch. 266, § 120E½(d).

[4] Massachusetts enacted Mass. Gen. Laws ch. 266, § 120E½ (the "2007 Statute") in 2007, having previously enacted a less restrictive "no-approach" statue – one that created 18-foot buffer zones around abortion clinic entrances, inside which speakers were prohibited from approaching within six feet of a potential listener without consent – in 2000. *See* Br. of Pet'rs, *McCullen v. Coakley*, No. 12-1168, at 4. Significantly, the U.S. Court of Appeals for the First Circuit found that the 2000 law "clearly affect[ed] anti-abortion protestors more than other groups" and that it had targeted "anti-abortion protests." *McGuire v. Reilly*, 260 F.3d 36, 44 (1st Cir. 2001).

were harassed, intimidated, or impeded. Even if there was evidence that Petitioners or other pro-life activists were impeding access to abortion clinics and harassing or intimidating women, Massachusetts could have enforced its interests through a multitude of readily-available legal remedies, none of which would have infringed on Petitioners' First and Fourteenth Amendment rights. Given the absence of evidence to justify the 2007 Statute, *Amicus* submits that a more nefarious purpose undergirds the 2007 Statute and similar statutes throughout the nation: the silencing of Petitioners' viewpoint.

ARGUMENT

I. The 2007 Statute Strikes At The Heart Of The First Amendment As To Both The Content Of Expression Affected And The Place Where Such Expression May Occur

Freedom of expression must be particularly well-guarded when, as here, the controversial or impassioned nature of the speaker's message has the potential to stir emotions and trigger attempts to suppress that message. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating prohibitions on desecrating the U.S. flag). The issue of abortion is undoubtedly one of the most important ones of our times and, as such, is entitled to "special protection" under the First Amendment. *Snyder*, 131 S. Ct. at 1219. Such protection exists even if the speech has the potential to be upsetting. *Id.*

Moreover, the government may not infringe upon that protection on the presumption that the speech and expression will be unduly disturbing or disruptive. In *Johnson*, for example, this Court rejected the state's claim that a ban on flag-burning was justified by its forecast that such activity would cause breaches of the peace. A mere assumption that particular expression will result in the kind of disruption the government may regulate is insufficient to justify restrictions on expression and related activities. *Johnson*, 491 U.S. at 408. As this Court has written:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is not room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949).

Petitioners have pointed out the utter paucity of evidence supporting the need (or even wisdom) for the exclusion zones imposed by the 2007 Statute. *See* Br. for Pet'rs at 7-8. Plainly, Commonwealth

lawmakers improperly assumed, based on evidence that is anecdotal at best, that Petitioners and other pro-life advocates were engaged in overbearing and obstructionist activities at abortion facilities. Such cavalier assumptions are manifestly insufficient to warrant regulations that drastically limit – and effectively silence – speech on a matter of serious national concern.

Not only is the expression at issue here on a subject of national significance at the heart of the First Amendment's special protection, Petitioners are prohibited from engaging in this expression on public sidewalks – the quintessential public forum. As such, "the government's ability to permissibly restrict expressive conduct is *very limited*[.]" *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added).

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)); *see also Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997) ("[S]peech in public areas is at its most protected on *public sidewalks*, a prototypical example of a traditional public forum") (emphasis added).

The fact that an abortion clinic is located by a public sidewalk is of no matter, as "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 481. Therefore, whether judged as a content-based or content-neutral regulation, the 2007 Statute impermissibly curtails Petitioners' First Amendment rights. That it does so on a topic of national significance – the most protected form of speech – and in the most protected arena – the public sidewalk – only serves to illustrate its egregiousness.

II. The 2007 Statute is an Impermissible Content-Based Regulation

Prior to the enactment of the 2007 Statute, Petitioners expressed their constitutionally enshrined rights by reaching out to women at abortion clinics and attempted to persuade them not to proceed with an abortion. Indeed, the record illustrates that Petitioners successfully persuaded

many women to change their minds and not go ahead with the procedure. *See, e.g.*, JA 180 (Petitioner Zarrella made approximately 100 successful interactions before the enactment of the 2007 Statute). Moreover, at the time Massachusetts enacted the 2007 Statute, there was no evidence of a single conviction during the preceding period under any state, federal, or local law relating to violence, obstruction, intimidation, trespass, or harassment at an abortion clinic in the state. *See id.* at 68-69. This is hardly surprising given the peaceful nature of Petitioners' activities. *See, e.g.*, *id.* at 132 (describing how Petitioner McCullen and her husband have donated over $50,000 of their own money to help women who have decided not to go ahead with abortions); *id.* at 175 (describing Petitioner Zarrella as an 85-year-old grandmother who offers counseling at the Boston clinic); *id.* at 188-89 (describing Petitioner Smith as a 77-year-old grandfather who prays the rosary in front of the Boston clinic on Saturday mornings).

Despite this, and the availability of the 2000 "no-approach" statute – along with a multitude of other federal and state laws, both criminal and civil – to ensure that its purported interests were protected, Massachusetts went far beyond the outer bounds of the 8-foot buffer zone around *all* healthcare facilities that this Court upheld in *Hill v. Colorado*, 530 U.S 703 (2000).[5] Undoubtedly

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[5] Troublingly, and perhaps reflective of a growing trend of the evisceration of constitutional rights in this arena, after this Court granted *certiorari*, the city of Portland, Maine announced that it was weighing a proposal to

concerned that outright targeted legislation would raise the suspicions of the courts, the Massachusetts General Assembly – and later Respondent Coakley[6] – attempted to give the 2007 Statute a veneer of constitutionality by attempting to frame it in content-neutral terms, while at the same time affording themselves "a convenient tool" to prosecute "'particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940)).

Notwithstanding the absence of any patent regulation of expressive content or discrimination against viewpoint in the text of the 2007 Statute, it still may be found to be content-based or viewpoint discriminatory in light of its effects. As this Court wrote in the context of closely analogous religious freedoms:

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create a similar 35-foot buffer zone around a Planned Parenthood clinic. *See Another New England state considers buffer zone law around abortion clinic*, 22 News, July 31, 2013, http://www.wwlp.com/news/massachusetts/another-new-england-state-considers-buffer-zone-law-around-abortion-clinic (last visited Sept. 12, 2013).

[6] *See* JA 92 (referencing a letter from Attorney General Coakley to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the 2007 Statute, sent less than two weeks after Petitioners sought to enjoin enforcement of the 2007 Statute in January 2008). Respondent Coakley's *post hoc* actions further serve to illustrate the facial invalidity of the 2007 Statute.

> We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy*, [476 U.S. 693, 703 (1986)] (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993).

For a content-based regulation to satisfy strict scrutiny, the government must "show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Frisby*, 487 U.S. at 481 (internal quotation marks and citation omitted). Here, the 2007 Statute falls woefully short of this standard. Indeed, the absence of content-neutrality is readily apparent from the 2007 statute's language. By exempting employees or agents of the clinic acting within the scope of their

employment, the 2007 Statute specifically permits speech on one side of the debate. This creates a "scheme of disfavored-speech zones on public streets and sidewalks," and "opinion[s] validating them, are antithetical to our entire First Amendment tradition." *Hill*, 530 U.S. at 768 (Kennedy, J., dissenting). Even accepting Respondents' interest in securing unimpeded and intimidation- and harassment-free access to abortion clinics, the 2007 Statute is not even remotely close to being narrowly drawn to achieve that interest, especially because regulation of speech activity in public fora is "subject to the highest scrutiny." *ISKCON v. Lee*, 505 U.S. 672, 678 (1992).

Here, the 35-foot buffer zones go way beyond what this Court held permissible in *Hill* and therefore burden significantly more speech than is necessary to protect Respondents' interest. This is particularly troubling here, as Respondents did not present any evidence of criminal convictions of the more limited 2000 "no-approach" law. *See* JA 68-69. On the contrary, the record is replete with exactly the opposite facts: Petitioners' expressive activity was frequently well-received by women attending abortion clinics.[7] *See, e.g.*, JA 136 (Petitioner McCullen: "Over the years, hundreds of women have accepted my offers of help."); JA 180 (Petitioner

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[7] The 2007 Statute therefore not only violates Petitioners' First Amendment rights, but also violates the rights of women who would be receptive to Petitioners' message. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Calif.*, 475 U.S. 1, 8 (1986) (noting that the First Amendment "protects the public's interest in receiving information").

Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the [2007 Statute] took effect[.]") That some women (or, more likely, the abortion clinics) do not wish to receive Petitioners' message is irrelevant, as "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted). Finally, assuming *arguendo* that Petitioners or other pro-life individuals had impeded access to, or harassed or intimidated women outside of, abortion clinics, Massachusetts had – and has – at its disposal a variety of federal and state laws, in both the criminal and civil context, to enforce its interest.[8] Tellingly, Respondents did not (because they cannot) point to any deficiencies in then-existing legislation

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[8] *See, e.g.*, 18 U.S.C. § 248(c)(1) (permitting any person seeking to provide or obtain reproductive health services to seek injunctive relief, attorneys' fees, and compensatory and punitive damages); 18 U.S.C. § 248(c)(2)-(3) (permitting federal and state attorneys general to seek injunctive relief, civil penalties, and compensatory damages on behalf of aggrieved persons); Mass. Gen. Laws ch. 266, § 120E (permitting medical facilities to obtain injunctive relief and compensatory and exemplary damages against persons obstructing entry); Mass. Gen. Laws ch. 12, § 11H (permitting state attorney general to obtain injunctive relief against private persons who intimidate, interfere with, or coerce a person seeking to exercise rights protected by federal or state law).

that made the 2007 Statute necessary to enforce its interests. Given this, it should properly be viewed as "a speech regulation directed against the opponents of abortion," which the lower courts improperly afforded "the benefit of the 'ad hoc nullification machine'" that exists to squelch speech seeking to limit abortions. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting). As such, this Court should reverse the trend of upholding speech regulations around abortion clinics by overruling *Hill*, and invalidating the 2007 Statute, as both "contradict[] more than a half century of well-established First Amendment principles." *Id.* at 765 (Kennedy, J., dissenting).

III. Even if the 2007 Statute is Content-Neutral and Judged as a Time, Place, and Manner Regulation, it Fails to Pass Muster

The U.S. Court of Appeals for the First Circuit upheld the 2007 Statute as a limited time, place, and manner statutory restriction on speech in a public forum. *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013). Even if judged under a time, place, and manner standard, however, the 2007 Statute fails. Under an intermediate scrutiny standard, the 2007 Statute must be: (i) content neutral, (ii) narrowly tailored, (iii) serve a significant governmental interest, and (iv) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 785 (1989). Although the time, place, and manner "fit" between the governmental

interest and the breadth of regulation is subject to the less demanding intermediate level of scrutiny, the Court must "focus[] on the evils the [Government] seeks to eliminate" and ask whether the regulation at issue "significantly restrict[s] a substantial quantity of speech that does not create the same evils." *Id.* at 799 n.7.

As discussed *infra*, the absence of evidence justifying the 2007 Statute provides compelling support for the conclusion that it is a content-based and viewpoint-based regulation, designed to silence Petitioners. Even assuming *arguendo* that the 2007 Statute is content-neutral, it fails the remaining three prongs of *Ward*. *First*, the narrow tailoring requirement is designed to prevent legislation that "burdens substantially more speech than is necessary to further the government's legitimate interests . . . ." *Id.* at 791. Here, there is no justification for a 35-foot buffer zone when the previous statute – with its smaller buffer zone – readily satisfied Respondents' interests. Consequently, the 2007 Statute prevents Petitioners from effectively engaging in their chosen form of expression, while simultaneously failing to further Massachusetts' interests. Moreover, because the 2007 Statute operates at the core of the rights to freedom of speech, it was the duty of the Massachusetts General Assembly to craft its restrictions with particular care to safeguard these "delicate and vulnerable, as well as supremely precious" freedoms. *NAACP v. Button*, 371 U.S. 415, 433 (1963). This the Commonwealth failed to do. Put simply, the 2007 Statute does "not aim specifically at evils within the allowable area of

[Massachusetts'] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech . . . ." *Thornhill*, 310 U.S. at 97. Indeed, such an overbroad regulation is the very antithesis of the "narrow tailoring" the First Amendment's time, place, and manner standard requires. Because the 2007 statute thus regulates expression "in such manner that a substantial portion of the burden on speech does *not* serve to advance the [regulatory] goals" it should be invalidated on this ground alone. *Ward*, 491 U.S. at 799 (emphasis added).

Second, as discussed herein, the governmental interest is illusory and can be met with tools already readily available to Massachusetts. *See* Section II, *infra*, at n.8. The 2007 Statute should likewise be invalidated on this ground.

Third, the 2007 Statute does not leave open ample alternative means of communication. As the record demonstrates, Petitioners' message may only be delivered with any degree of effectiveness by in-person communication – something a 35-foot buffer zone completely prevents. *See, e.g.*, JA 180 (Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the [2007 Statute] took effect[.]") Whatever the meaning of "ample alternative channels of communication," the constitutional principle is well-established: "the streets are natural and proper places for the dissemination of information and opinion; and one is

not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 160-61 (1939). Forcing Petitioners to express their message from a distance of at least 35 feet from their intended audience is incompatible with this requirement, especially because "[t]he First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

CONCLUSION

For the reasons set forth above, *Amicus* respectfully asks this Court to invalidate the 2007 Statute and overrule *Hill*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTEREST OF THE *AMICI CURIAE*

The *amici* are cities located across the United States that recognize the paramount importance not only of the constitutional right to speak freely, but also of the constitutional right to privacy, including the right to unfettered access to reproductive health care, free from harassment and intimidation. The *amici* have a shared interest in maintaining the authority and flexibility inherent in their police powers to balance each of these rights—and to protect the health and safety of their residents—in the manner best-suited to each of their unique circumstances, including through the enactment of "fixed buffer zone" laws similar to the Massachusetts statute at issue in this case (the "Act").

Some, but not all, of the *amici* have, in fact, promulgated laws creating fixed buffer zones outside of reproductive health care centers (the "Ordinances") (collectively with the Act, the "Fixed Buffer Zone Laws"). For example, San Francisco, California, has enacted an ordinance that makes it "unlawful for any person to enter or remain" within a 25-foot buffer zone around an entrance, exit, or driveway of a reproductive health care facility. S.F., CAL., POLICE CODE art. 43, § 4303(a). The ordinance expressly exempts individuals entering or exiting the facility; employees, agents, or volunteers of the facility; law enforcement, emergency medical, firefighting, construction, and utilities personnel; and individuals passing temporarily through the buffer zone; provided that these individuals do not engage in "demonstration activity" while in the zone. *Id.* § 4303(b).

Burlington, Vermont, has enacted an ordinance that creates a 35-foot buffer zone around the premises of a reproductive health care facility in which "[n]o person or persons shall knowingly congregate, patrol, picket or demonstrate[.]" BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-113(2). Like the Act and the San Francisco ordinance, the Burlington ordinance carves out certain necessary exceptions, including exceptions for persons entering or leaving the facility; employees or agents of the facility acting within the scope of their employment; law enforcement, ambulance, firefighting, construction, utilities, public works, and other municipal agents acting within the scope of their employment; persons using the public sidewalk or right-of-way solely for the purpose of reaching a destination other than the facility; and any person or persons on private property with the consent of the property owner. *Id.* § 21-113(2)(a).

West Palm Beach, Florida, enacted two laws in 2005 to address public health and safety concerns in the vicinity of health care facilities: a "public safety buffer zone" that made it unlawful to "engage in protesting, picketing, distributing leaflets or handbills, attempting to impede access, or engage in oral advocacy, education or counseling activities" within 20 feet of a health care facility's driveways and entrances, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425; and a "quiet zone" that made it unlawful to "shout" or produce "any amplified sound" within 100 feet of any portion of a health care facility, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. II, § 34-38. In 2006, a federal district court enjoined the city from enforcing the buffer zone ordi-

nance, leaving only the quiet zone ordinance in place. See *Halfpap* v. *City of West Palm Beach*, No. 05-80900, 2006 WL 5700261 (S.D. Fla. Apr. 12, 2006).

Harrisburg, Pennsylvania, has enacted an ordinance that creates a 20-foot buffer zone surrounding health care facilities in which persons may not "knowingly congregate, patrol, picket or demonstrate." HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A). Similar to the San Francisco and Burlington ordinances, Harrisburg's ordinance includes exceptions for "police and public safety officers, fire and rescue personnel," "emergency workers in the course of their official business," "authorized security personnel," and "employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.*

Los Angeles, California, has enacted an ordinance that prohibits intentional interference with the normal operations of a medical facility and authorizes police to create a 50-foot buffer zone when such interference occurs. L.A., CAL., MUN. CODE ch. 5, art. 6.1, § 56.45(b). Specifically, the police are authorized to order "the immediate dispersal of any congregation that . . . threatens or violates the peace or security of, a medical facility." *Id.* § 56.45(c). Once properly ordered to disperse by the police, protestors must retreat at least 50 feet from the medical facility, the facility's parking facilities, and any connecting pedestrian access, and they may not return for at least four hours, or until the police otherwise instruct. *Id.* § 56.45(d).

Although the cities of New York, Chicago, Baltimore, Boston, Minneapolis, Saint Paul, Columbus, Springfield, Austin, Denver, Boulder, Houston, and Ann Arbor have not needed to enact Fixed Buffer Zone Laws, they wish to ensure that any decision of this Court does not impede the flexibility that they historically have been afforded—in the context of anti-abortion protests and otherwise—to determine how best to respond to local conditions and concerns as they develop, including through the imposition of appropriately-tailored buffer zones. As a result, all of the *amici* have an interest in seeing the Massachusetts Act upheld.

SUMMARY OF ARGUMENT

The Fixed Buffer Zone Laws are neither novel nor unique. In exercising their police powers, state and local governments have regularly made use of fixed buffer zones at protest and demonstration sites because, in their judgment, such safety zones were the most efficient and reliable way to protect the public—not from words, but from violence, harassment, or obstruction. Massachusetts and several of the *amici* have made precisely such a judgment here. Because this Court traditionally has granted deference to the judgment of state and local governments concerning regulation of the time, place, or manner of speech—and because those same entities require the flexibility to make such judgments if they are to govern effectively and protect their residents—the Act should be upheld.

Like safety zones imposed in other contexts, the Fixed Buffer Zone Laws are content neutral. Neither the Act nor the Ordinances discriminate on their face against anti-abortion speech, or any other message. And each of these laws was promulgated for the same content-neutral reasons that state and local governments have imposed fixed buffer zones in other contexts: "to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, [and] reduce disputes and confrontations requiring law enforcement services." BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings). Of course, in this case, Massachusetts and the *amici* have an additional interest at stake—the interest in protecting the constitutional "right to seek reproductive health care services." *Id.* But that additional

interest only strengthens the justification for regulation here.

Petitioners attempt to flip this constitutional interest on its head, arguing that, because the Fixed Buffer Zone Laws are tailored to protect access to reproductive health care, they have a disparate impact on anti-abortion speech; and, because of this disparate impact, they must be subject to strict scrutiny. But not only is petitioners' proposed "disparate impact" test unprecedented in this Court's First Amendment jurisprudence, it is also inconsistent with the deference historically granted to states and localities in the exercise of their police powers. Indeed, because there is a risk of "disparate impact" whenever local governments impose a time, place, or manner restriction on a protest or demonstration—and not just in this particular context—petitioners' proposed test could significantly undermine the ability of local governments to ensure public safety in a whole host of different circumstances. Because that cannot be the law, the Fixed Buffer Zone Laws are content neutral and subject only to intermediate scrutiny.

The Fixed Buffer Zone Laws also are narrowly tailored to serve significant governmental interests. Before enacting the Fixed Buffer Zone Laws, both Massachusetts and the *amici* had attempted to protect access to, and to ensure safety at, clinic sites through narrower provisions, like those endorsed by petitioners, that prohibited violence, obstruction, or harassment. But, in many locations, these laws proved both ineffective and difficult to enforce. Infractions could not be established without constant police monitoring, and even with such monitoring, it

was often difficult for police to determine whether a protestor's conduct had, in fact, violated the law. As a result of these difficulties, Massachusetts and several of the *amici* elected to implement Fixed Buffer Zone Laws, creating a bright-line rule whereby protestors can engage in any form of expression they wish well within earshot and eyeshot of reproductive health care facilities, but they cannot cross a clearly-marked, fixed line that is 35 feet or less from the clinics. Because these Fixed Buffer Zone Laws are easy to understand and enforce, they are a more efficient and reliable way to protect clinic-goers and the public from violence, obstruction, and harassment. They are also far narrower than the safety zones utilized by state and local governments—and upheld by the courts—in other contexts.

Finally, the Fixed Buffer Zone Laws leave open adequate alternative channels for petitioners and other anti-abortion protestors to make their views known. Petitioners remain free to approach and communicate face-to-face with individuals heading into or out of clinics, so long as they stay a short distance away from the clinic doors. And they remain free to share their anti-abortion message with the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora. Because the Act and the other Fixed Buffer Zone Laws advance important state and local interests and do not meaningfully impede petitioners' ability to speak freely, they are consistent with the First Amendment and should be upheld.

ARGUMENT

I. State and Local Governments May Protect Public Safety and Privacy Rights by Regulating the Time, Place, and Manner of Speech.

The use of "police powers to protect the health and safety of [ ] citizens" is "primarily, and historically, . . . [a] matter[ ] of local concern." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996) (first alteration in original) (internal quotation omitted). State and local governments "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation omitted); see also *Gibbons* v. *Ogden*, 22 U.S. 1, 203 (1824) (recognizing that the powers reserved in the Constitution for the states include "health laws of every description"). Indeed, localities have not only "[t]he power" but also "the duty . . . to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of [their] residents." *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940).

To achieve these ends, state and local governments unquestionably may regulate where, when, and by what means speech may occur on their streets and sidewalks, so long as that regulation is not unreasonably restrictive. As this Court has explained, "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the gen-

eral comfort and convenience, and in consonance with peace and good order." *Shuttlesworth* v. *City of Birmingham, Ala.*, 394 U.S. 147, 152 (1969).

The flexibility afforded to state and local governments in regulating the time, place, and manner of speech is even more critical where, as here, that regulation serves to protect other constitutional rights: "[T]he First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson* v. *Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (upholding ordinance prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance of a polling place, where purpose of ordinance was to prevent voter intimidation); see also *Frisby* v. *Schultz*, 487 U.S. 474, 484–88 (1988) (upholding ordinance restricting picketing on streets or sidewalks outside of a residence where the ordinance was intended to protect the right to privacy). As a result, this Court has given state and local governments substantial latitude in balancing the right of their residents to speak freely against the right to safely and confidentially access health care, including reproductive health care. See, e.g., *Hill* v. *Colorado*, 530 U.S. 703, 716–17 (2000) (allowing restrictions on speech outside of health care facilities because of the "recognizable privacy interest" in patients seeking medical care); cf. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994) (affording deference to court enjoining expressive activity outside of reproductive health center).

II. The Fixed Buffer Zone Laws Are a Valid Exercise of State and Local Police Powers.

"[T]his Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson*, 504 U.S. at 197 (plurality). Because the Act—and the other Fixed Buffer Zone Laws—comply with all three of these requirements, the First Circuit's decision should be upheld.

A. The Fixed Buffer Zone Laws Are Not Content-Based.

The Fixed Buffer Zone Laws are content-neutral time, place, and manner restrictions. This Court has explained that a statute violates the principle of content neutrality if, "[o]n its face, [it] accords preferential treatment to the expression of views on one particular subject." *Carey* v. *Brown*, 447 U.S. 455, 460–61 (1980). But the Fixed Buffer Zone Laws do no such thing. They preclude *all* persons from entering or exiting a small area of land unless they are doing so for a few, exempt purposes unrelated to expression.[1] Of course, where "the government has adopted

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[1] Unlike the other Fixed Buffer Zone Laws, the Harrisburg ordinance does preclude a particular type of speech—that involving "picket[ing] or demonstrat[ing]." HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A); see also WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425(a) (2005) (enjoined version of ordinance prohibiting "oral advocacy, education or counseling" within fixed buffer zone). But this is precisely the type

a regulation of speech *because of* disagreement with the message it conveys," that regulation may be subject to strict scrutiny even if it does not discriminate on its face. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added). But the express purposes—and the actual purposes—of both the Act and the Ordinances are content neutral. These laws were not enacted in order to preclude abortion-related speech; they were enacted in order to ensure safety and order on public streets and sidewalks outside of reproductive health care clinics, and to protect the rights of individuals to access those facilities.[2]

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of language that this Court deemed content neutral in *Hill*. See 530 U.S. at 720–25.

[2] See, e.g., 2007 MASS. ACTS ch. 155 (stating that the purpose of the Massachusetts Act is, among other things, "to increase forthwith public safety at reproductive health care facilities"); S.F., CAL., POLICE CODE art. 43, §4301 (providing that ordinance was enacted for purpose of preventing "obstruction, delay, and deterrence of patients, and diversion of reproductive health care facilities' staff and resources" and promoting "the City's interest in maintaining the public health, safety, and welfare, and in preserving its residents' constitutional right to privacy"); BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings) (providing that ordinance was enacted "to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, reduce disputes and confrontations requiring law enforcement services, protect property rights, protect First Amendment freedoms of speech and expression and secure a person's right to seek reproductive health care services"); West Palm Beach, Fla., Ordinance No. 3875-05 (Sept. 26, 2005) (providing that ordinance was intended to promote, among other things, "the right of its citizens to privacy and the right to have safe access to and from all health care facilities," as well as "the City's interests in promoting public safety and order, the free flow of

Petitioners nonetheless argue that the Act should be deemed content-based because, "as a practical matter [it] affects speech on only one issue—and, indeed, on only one side of that issue." Pet. Br. 23. In essence, petitioners suggest that the Act has a disparate impact on anti-abortion speech,[3] and that, as a result of this disparate impact, it must be subject to strict scrutiny. But there is no disparate impact test in this Court's First Amendment jurisprudence. To the contrary, this Court has made clear time and again that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791; accord *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (holding that ordinance restricting location of adult film theaters was content neutral).[4]

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traffic on public streets and sidewalks, and protecting the property rights of its citizens").

[3] It is also not clear from the record that the Act does, in fact, disproportionately impact anti-abortion speech. To the contrary, the record confirms that pro-choice groups also congregate outside of clinics to express their views, and the Act has the same impact on speech by these pro-choice demonstrators as it does on speech by anti-abortion groups. See JA at 26–28 (noting that pro-choice demonstrators congregate outside clinic on the second Saturday of each month); *id.* at 123 (discussing pro-choice group causing disturbance outside clinic).

[4] Petitioners also suggest, at least implicitly, that the Act must be content-based because it was motivated by the conduct of one particular group—anti-abortion protestors. Pet. Br. 25 (criticizing the act for its "targeted burdening of speech outside abortion clinics"); *id.* at 26 (arguing that the Act is not content neutral because its "focused effect on speech about abortion is de-

This rule, announced in *Ward*, is indispensable to local governance. Localities are routinely required to address public safety concerns surrounding speech—not just in the abortion context, but in the context of all different types of protests, marches, and demonstrations. They must be able to respond quickly and appropriately to safety risks posed not only by anti-abortion protestors at clinics, but also by political activists at conferences or conventions, animal rights activists at race tracks, union employees at workplaces, and military protestors at parades and funerals. If petitioners were correct—and decisions made by local governments were subject to strict scrutiny whenever they had a disparate impact on the speech of one particular group or one particular message—it would be virtually impossible for the *amici* and other cities to ensure the safety of their inhabitants during such public gatherings.

Take the example of a city hosting the Republican National Convention. As a practical matter, any safety barriers or "no protest" zones that a city might choose to implement at the convention site would disproportionately impact speech by protestors seeking to convey an anti-Republican message. Under

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liberate"). But that argument is inconsistent with this Court's decision in *Frisby*, in which the Court held that an ordinance prohibiting picketing in front of a residence was content neutral, despite the fact that it was unequivocally prompted by the conduct of anti-abortion protestors picketing the home of a physician who performed pregnancy terminations. *Frisby*, 487 U.S. at 481–82; see also *Hill*, 530 U.S. at 724 (citing *Frisby* for the notion that a law is not content or "'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate").

the test proposed by petitioners, that fact alone would subject the city's decision to strict scrutiny—"the most demanding test known to constitutional law," Pet. Br. 52 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997))—and the safety barriers would only be permissible if the city could establish that they were, in fact, the least restrictive means of protecting convention attendees. This would leave municipal administrators and police in a conundrum: How are they to know in advance exactly how large of a barrier is big enough—but absolutely no larger than necessary—to ensure the safety of those attending the convention (and of protestors and other passersby)? If they err on the side of creating too small a safety zone, then there is a significant risk that people will get hurt. But if they err on the side of creating a zone that a court might find to be even slightly larger than necessary, then implementation of the safety zone could be enjoined, and the risks could be even greater. This dilemma would paralyze local governments, making it all but impossible for them to effectively exercise their police powers.

With good reason, this is not the law. Numerous courts have considered the constitutionality of precisely this type of "no protest" zone outside of political convention sites and, uniformly, have examined the propriety of such measures under intermediate scrutiny. See, e.g., *Marcavage* v. *City of New York*, 689 F.3d 98, 106 (2d Cir. 2012) (upholding a "no-demonstration zone" spanning two full New York City blocks surrounding a political convention); *Bl(a)ck Tea Soc'y* v. *City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004) (affirming denial of injunction against designated protest zones during political convention);

Am. Civil Liberties Union of Colo. v. *City & Cnty. of Denver*, 569 F. Supp. 2d 1142, 1184 (D. Colo. 2008) (upholding "Public/Demonstration Zone" outside political convention).

Political conventions are not the only context in which petitioners' proposed disparate impact test would wreak havoc on municipal governance. By definition, *every* protest, march, or demonstration concerns speech on a particular topic and from a particular viewpoint. So, under petitioners' proposed test, virtually *every* municipal act limiting the time, place, or manner of such gatherings would be subject to strict scrutiny.[5] This would hold true even if the

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[5] To borrow an example from the *amici* states supporting petitioners, 43 states and the federal government have enacted laws that create buffer zones around funeral sites in order to ensure the privacy and tranquility of such proceedings. See Br. of *Amici* State of Michigan and 11 Other States, at 7 n.2 (listing statutes). Many of these laws were enacted to cabin protests at military funerals by one particular group—the Westboro Baptist Church—seeking to convey one particular message—that God hates the United States for its tolerance of homosexuality. Without a doubt, then, these laws disproportionately impact this particular group and this particular message. Nonetheless, several Circuit Courts have held (and this Court has at least suggested) that these statutes are content-neutral time, place, and manner restrictions subject only to intermediate scrutiny. See *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011) (suggesting in dicta that laws imposing restrictions on funeral picketing are content neutral and may be considered "reasonable time, place, or manner restrictions"); *Phelps-Roper* v. *Koster*, 713 F.3d 942, 951, 954 (8th Cir. 2013); *Phelps-Roper* v. *City of Manchester, Mo.*, 697 F.3d 678, 683, 695 (8th Cir. 2012) (upholding city ordinance limiting funeral protests as a reasonable time, place, and manner restriction); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 358, 373 (6th Cir. 2008) (upholding state statute prohibit-

decision were made for reasons entirely independent of the protests: Each temporary closure of the sidewalks in front of a reproductive health center for street or utility repairs would be subject to strict scrutiny. The test would also extend to ordinances having nothing to do with protests or demonstrations. For example, several cities have laws prohibiting pedestrians from loitering on medians or other select areas of the streets or sidewalks.[6] Such laws are intended to promote public safety, but because they disproportionately impact panhandling, they would be subject to strict scrutiny under petitioners' proposed test. In short, were this Court to adopt a disparate impact standard for time, place, and manner regulations, it would effectively tie the hands of local governments, making it impossible for them to carry out their "duty . . . to take adequate steps to preserve the peace and to protect . . . [their] residents." *Thornhill*, 310 U.S. at 105.

Petitioners and their *amici* attempt to distinguish the Act from other protest safety zones, arguing that

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ing picketing or protesting within 300 feet of a funeral or burial service).

[6] See, e.g., PORTLAND, ME., CITY CODE ch. 25, art. II, § 25-17(b) (prohibiting standing, sitting, staying, driving, and parking in medians, with an exception for pedestrians who are using the median as they cross from one side of the street to the other); WORCESTER, MASS., REV. ORDINANCES OF 2008, as amended through Oct. 22, 2013 ch. 13, § 77(a) (prohibiting standing or walking on a traffic island or roadway except for limited purposes, including crossing at an intersection or crosswalk); S.F., CAL., POLICE CODE art. 2, § 168 (prohibiting sitting or lying on sidewalks between 7 a.m. and 11 p.m.); LAGUNA HILLS, CAL., MUN. CODE ch. 12, § 42.030 (prohibiting pedestrians from "stepping, standing, sitting, or lying upon any median island").

the Act is not even-handed because it allows clinic employees, acting within the scope of their employment, to enter the buffer zone.[7] They suggest that, even if the Act were not otherwise content-based, this exception necessarily makes it so. Pet. Br. 28. But this same argument could be made whenever states or localities create safety zones. Returning to the Republican National Convention example, Republican delegates and other party members attending or working at a convention naturally are permitted within the safety zone so that they can access the event site. And, once within the safety zone, they are free to express themselves in any manner they choose. That disparity is a necessary consequence of using safety barriers to protect the public. It is not a basis for subjecting all such barriers to strict scrutiny.

Petitioners' proposed disparate impact test not only would undermine the ability of states and localities to exercise their police powers, it would also undermine the very First Amendment principles that petitioners purport to defend. To avoid strict scrutiny, state and local governments would have no choice but to enact broader, prophylactic regulations that limit the time, place, or manner of speech at all protests, marches, or demonstrations—irrespective of the historical behavior of the group protesting or otherwise speaking, and irrespective of the size, location, timing, duration, and expected noise level of the

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[7] See, e.g., Pet. Br. 27–28; Br. of *Amicus* 40 Days for Life, at 10–12; Br. of *Amici* 12 Women Who Attest to the Importance of Free Speech in their Abortion Decisions, at 11; Br. of *Amici* Legal Life Defense Foundation & Walter B. Hoye II, at 16–18.

gathering. Because of the broad applicability of such an ordinance, it would not have a disparate impact on any particular group or message, and so would not be subject to strict scrutiny. But it would impose a greater burden on an even wider range of expression, and it would be completely out of line with how local governments have been exercising their police powers for hundreds of years.

In short, states and localities must have substantial flexibility to respond to unique local circumstances in real time. The disparate impact test endorsed by petitioners would make this impossible by prohibiting localities from enacting reasonable time, place, or manner restrictions in response to legitimate concerns about the conduct of protestors—in the abortion context or any other. That cannot be the law.

B. The Fixed Buffer Zone Laws Are Narrowly Tailored.

Not only are the Fixed Buffer Zone Laws content neutral, they also are narrowly tailored to serve the significant government interests of ensuring public safety and protecting access to reproductive health care.

Where a law regulating speech is content neutral, it "need not be the least restrictive or least intrusive means" of protecting the legitimate interests at stake. *Ward*, 491 U.S. at 798. To the contrary, courts must "defer to the [state's or] city's reasonable determination" concerning the precise nature, scope, and extent of restriction required. *Id.* at 800. Thus, in *Ward*, "[t]he Court of Appeals erred in failing to

defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician." *Id.* And in *Hill*, this Court granted "deference to the judgment of the Colorado Legislature" in determining "whether or not the 8-foot [floating buffer zone] [wa]s the best possible accommodation of the competing interests at stake." 530 U.S. at 727; cf. *Madsen*, 512 U.S. at 769–70 ("The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to [the regulating entity's] familiarity with the facts and [relevant] background[.]"); *Burson*, 504 U.S. at 210 ("We simply do not view the question whether the 100-foot boundary line [around polling places] could be somewhat tighter as a question of 'constitutional dimension.' ").

Applying this precedent, courts around the country have granted deference to local governments concerning the need for—and the nature, size, and scope of—fixed buffer zones. And, in so doing, they have upheld buffer zones that were far more restrictive than the Act and the Ordinances. For example, in *Marcavage* v. *City of New York*, the Second Circuit upheld a "no-demonstration zone" surrounding a political convention that spanned two full New York City blocks. 689 F.3d at 106. The court observed that "[i]t may be . . . that a no-standing zone or no-large-sign zone would have been a less restrictive alternative, but 'narrowly tailored' does not mean the 'least restrictive or least intrusive means.' " *Id.* (quoting *Ward*, 491 U.S. at 798). Similarly, in examining the security protocol for a North Atlantic Treaty Organization conference, the Tenth Circuit upheld

the creation of a "security zone" that closed off to protesters "several blocks in all directions" from the conference. *Citizens for Peace in Space* v. *City of Colorado Springs*, 477 F.3d 1212, 1217–18 (10th Cir. 2007). The court rejected appellant's contention that it was unnecessary to completely exclude protestors from the security zone because, among other things, the complete exclusion promoted the city's legitimate interest in decreasing the burden on its police force. *Id.* at 1223. And in *Menotti* v. *City of Seattle*, the Ninth Circuit upheld an order prohibiting all persons, with limited exceptions, from entering a portion of downtown Seattle during a World Trade Organization conference. 409 F.3d 1113, 1118, 1125 (9th Cir. 2005). The court concluded that the order was narrowly tailored, despite observing that only a small number of "violent protestors were breaking the law amidst throngs of lawful protestors." *Id.* at 1132, 1137.

The *amici* supporting petitioners have argued that cases such as these are distinguishable because they concerned restrictions that were more limited in time than the Fixed Buffer Zone Laws.[8] But in those cases, as here, the timeframe of the restriction corresponded to the expected timeframe of the protests. If anything, the fact that anti-abortion protests are often perpetual makes the use of narrowly tailored, prophylactic regulation all the more appropriate. As acknowledged by this Court in *Schenck* v. *Pro-Choice Network of Western New York*, because anti-abortion "protests [a]re constant," they are also more likely to

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[8] See, e.g., Br. of *Amici* State of Michigan and 11 Other States, at 4, 7–9.

"overwhelm[] police resources"—creating an even greater need for preventative measures. 519 U.S. 357, 363–64 (1997).

This Court also has repeatedly recognized—in other contexts and in this one—that general laws prohibiting violence and obstruction are not always adequate to protect the public's safety or the ability of individuals to exercise their constitutional rights. For example, in *Burson*, this Court rejected the argument that "restricted zones [outside polling places] are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor . . . to use violence or intimidation to prevent voting." 504 U.S. at 206. The Court explained that such a statute would ban only the most "blatant and specific attempts" to interfere with an individual's ability to exercise his or her constitutional right to vote, while "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."[9] *Id.* at 207. Similarly, this Court acknowledged in *Hill* "the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior." 530 U.S. at 729.

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[9] Notably, because the statute at issue in *Burson* was content-based, this Court examined it under strict scrutiny and nonetheless held that the 100-foot buffer zone was the "least restrictive means to serve the State's interests." 504 U.S. at 195, 211 (plurality). In other words, the Court concluded that a statute restricting "violence or intimidation" necessarily would be insufficient to protect the constitutional right to vote.

Both the record in this case and the legislative records supporting the Ordinances confirm that the government interests at stake here could not be sufficiently protected through laws prohibiting violence and obstruction. Before enacting the Fixed Buffer Zone Laws, Massachusetts and several of the *amici* had laws in effect that prohibited violent, abusive, or obstructionist conduct outside of reproductive health centers.[10] But those laws proved inadequate to ensure public safety at clinic sites and to protect access to reproductive health care.[11]

For example, before the passage of the Act, Massachusetts had laws in effect that precluded violence and obstruction at reproductive health care facilities. See MASS. GEN. LAWS ch. 266, § 120E½(e). It also had a "floating buffer zone" law similar to that addressed by this Court in *Hill*. See *McGuire* v. *Reilly*, 260 F.3d 36, 40–41 (1st Cir. 2001). But in spite of

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[10] See, e.g., MASS. GEN. LAWS ch. 266, § 120E½(e) (making it unlawful to obstruct entry to a reproductive health care facility); CAL. PENAL CODE § 423.2(c) (making it unlawful to interfere with reproductive health services client, provider, or assistant); VT. STAT. ANN. tit. 13, § 1026 (making it unlawful to obstruct vehicular or pedestrian traffic); PA. CONS. STAT. tit. 18, § 5507(a) (making it unlawful to intentionally obstruct any sidewalk or other public passage).

[11] As described in more detail by other *amici* supporting the respondents, there is a long history in this country of violence, obstruction, and intimidation at reproductive health care facilities. See, e.g., NATIONAL ABORTION FEDERATION, NATIONAL ABORTION FEDERATION VIOLENCE AND DISRUPTION STATISTICS, *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2011.pdf (showing incidents of violence and disruption against abortion providers from 1977 through 2010).

these laws, women and men seeking to enter reproductive health centers still could not gain access without enduring verbal harassment, having literature and leaflets thrown at them, and being videotaped and photographed against their will. JA at 44–45, 49–51, 60–63. This situation created public safety hazards, as described in detail by the clinic security officers and Boston Police. *Id.* at 95–103, 122–28. Police and other law enforcement officials also had difficulty enforcing these prior laws, and, even when arrests were made, it was difficult to obtain convictions. *Id.* at 31, 33, 67–71, 126.

Several of the *amici* faced similar obstacles prior to enacting Fixed Buffer Zone Laws. For instance, San Francisco's prior ordinance—like the prior Massachusetts statute—included a "floating buffer zone" similar to that upheld by this Court in *Hill*.[12] But,

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[12] Several cities, including Denver and Boulder, currently have "floating buffer zone" ordinances similar to the statute upheld in *Hill*. See, e.g., DENVER, COLO., CODE OF ORDINANCES ch. 38, art. IV, § 38-114; BOULDER, COLO., REV. CODE tit. 5, § 5-3-10; PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. 1, § 623.01. Accordingly, petitioners' request that this Court reconsider its decision in *Hill* is inappropriate not only for the reasons set forth in respondents' brief, but also because the doctrine of *stare decisis* is intended to protect such state and local regulation, enacted in reliance on the precedent of this Court. See, e.g., *Johnson* v. *Texas*, 509 U.S. 350, 366–67 (1993) (explaining that "[t]he interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command"); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854–55 (1992) (observing that this Court must consider "the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application").

notwithstanding that the ordinance prohibited "harassment, within 100 feet of an exterior wall of a health care facility," protestors still were able to successfully block the sidewalks adjacent to the clinic and the clinic entrances and exits.[13] Moreover, San Francisco encountered difficulty enforcing its prior ordinance because each violation was short-lived and, thus, difficult to establish absent direct police observation. And even when police were on the scene and could observe the protestors' conduct, it was often too difficult to measure whether, in fact, a protestor had entered the floating buffer zone.[14]

Similarly, in Burlington, prior to the enactment of the Fixed Buffer Zone Law the police department found it difficult to prevent harassment and obstruction in the areas surrounding reproductive health centers. Although obstruction of pedestrian traffic was prohibited by state law, that statute was difficult to enforce, and it did not prohibit other forms of harassment.[15] As explained by a member of the Bur-

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[13] See S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), *available at* http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=164&clip_id=17316, at 23:40; see also S.F., CAL., POLICE CODE art. 43, § 4301 (2013) ("Due to the density and space constraints of the City's urban landscape, [the previous ordinance in San Francisco] has not adequately prevented harassment, delay, and deterrence of patients seeking vital health care services.").

[14] See, e.g., S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), at 22:25.

[15] See Burlington, Vt., City Council Mtg. (May 21, 2012), *available at* http://www.cctv.org/watch-tv/programs/burlington-city-council-214, at 32:04 (describing protestors "verbally assaulting and physically blocking" women from entering clinic).

lington Police Department, individuals who had to push through a wall of protestors in order to gain entry to the clinic often did not report that fact to the police. And when such conduct was reported, it was difficult to determine and prove whether, in fact, pedestrian traffic had been obstructed, and, if so, who was responsible.[16]

In West Palm Beach, just two months before the City enacted its fixed buffer zone ordinance, a reproductive health care center within city limits had been subjected to arson—the third such clinic fire in Florida in two years.[17] Even before the fire, however, the clinic's director had been petitioning city officials to consider imposing a fixed buffer zone because of complaints that anti-abortion protesters were regularly intimidating, obstructing, and harassing patients.[18]

Despite this persistence of violence and obstruction, petitioners nonetheless suggest that the then-existing laws prohibiting such conduct in Massachusetts sufficed to protect public safety and access to reproductive health care because "government agen-

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[16] Burlington, Vt., City Council Ordinance Comm. Mtg. (June 27, 2012), *available at* http://www.cctv.org/watch-tv/programs/ordinance-committee-part-1, at 38:10 & 39:20.

[17] See NATIONAL ABORTION FEDERATION, HISTORY OF VIOLENCE/ARSONS AND BOMBINGS, *available at* http://www.prochoice.org/about_abortion/violence/arsons.asp; *New Limits Set For Abortion Protesters*, MIAMI HERALD, Sept. 28, 2005, at B11.

[18] See, e.g., Peter Franceschina, *Women's Clinic Reopens Five Weeks After Holiday Fire*, SUN SENTINEL, Aug. 11, 2005, at B13, *available at* http://articles.sun-sentinel.com/2005-08-11/news/0508101546_1_clinic-fire-abortion-clinic-womancare-center.

cies, medical facilities, and individuals [could] seek injunctive and other civil relief against persistent offenders." Pet. Br. 36. This argument is specious: State and local "[l]egislatures [are] permitted to respond to potential [impairments of constitutional rights] with foresight rather than reactively." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195 (1986); see also *Hill*, 530 U.S. at 729 ("[T]he statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior.").

Moreover, the injunction is an inadequate tool to protect the significant rights and interests at stake: Injunctions bind particular individuals only; as a practical matter, they are available only after one or more violations *already* have occurred; they take significant time and resources to obtain; they are left to the discretion of the courts and, thus, cannot replace the authority of state and local legislatures to make law; and, as this Court has repeatedly recognized, they are available only upon a heightened showing, beyond that required to defend content-neutral time, place, and manner regulations. *Schenck*, 519 U.S. at 372 (holding that injunctions must "burden no more speech than necessary to serve a significant governmental interest"); accord *Madsen*, 512 U.S. at 765.

As evidenced by the facts and circumstances of the *Schenck* case, these differences between prophylactic lawmaking and retroactive injunctions are significant. In *Schenck*, doctors and health care clinics filed a private-party suit seeking an injunction against anti-abortion protestors who had repeatedly violated the existing laws prohibiting violence and

obstruction at clinic sites. Before seeking relief from the courts, "the clinics [had been] subjected to numerous large-scale blockades" and "consistent[] attempt[s] to stop or disrupt clinic operations." 519 U.S. at 362. The initial attempts made by "sidewalk counselors" to "persuade [women] not to get an abortion," if rebuffed, "often devolved into 'in your face' yelling, and sometimes into pushing, shoving, and grabbing," and "the local police had been 'unable to respond effectively' to the protests, for a number of reasons," including that "the protests were constant, overwhelming police resources; when the police arrived, the protesters simply dispersed and returned later; prosecution of arrested protesters was difficult because patients were often reluctant to cooperate for fear of making their identity public; and those who were convicted were not deterred from returning to engage in unlawful conduct." *Id.* at 363–64. The clinics were left with no choice but to spend their own resources pursuing litigation. In the 17 months between the filing of the complaint and the issuance of the preliminary injunction in *Schenck*, the protestors continued to engage in "sidewalk counseling" and "constructive blockades [which] consisted of 'demonstrating and picketing around the entrances of the clinics, and . . . harassing patients and staff entering and leaving the clinics.'" *Id.* at 365 (alteration in original). Although the district court ultimately issued the requested injunction, it held 39 days of hearings before doing so. *Id.* at 365–66. The case then continued for another five years before this Court struck down a portion of the injunction for failure to meet the heightened showing applicable only to injunctive relief. And, of course, the portion of the injunction that was left intact could be en-

forced only by the particular clinics that brought suit, and only against the particular individuals who had been named in the complaint six years earlier. Certainly, petitioners cannot be suggesting that such injunctive relief is sufficient to ensure the safety and wellbeing of clinic patients, staff, and the public—or that state and local governments are somehow precluded by the First Amendment from taking any additional steps to protect their residents.

Petitioners' argument also ignores the practical realities faced by local governments. Cities, towns, and counties often do not have sufficient resources to post police officers outside of reproductive health centers every day during business hours—let alone to pursue and enforce injunctions like that addressed by this Court in *Schenck*. Because Fixed Buffer Zone Laws provide clear, bright-line rules for *all* persons in the vicinity of a reproductive health care facility, such laws decrease the need for a police presence and judicial intervention. And because the preservation of such scarce municipal resources is itself a legitimate governmental interest, the Fixed Buffer Zone Laws are narrowly tailored. See, e.g., *Citizens for Peace in Space*, 477 F.3d at 1223 (upholding security zone, because, among other things, the complete exclusion promoted the city's legitimate interest in decreasing the burden on its police force).

C. The Fixed Buffer Zone Laws Leave Open Adequate Alternative Channels for Communication.

Petitioners argue that the Act fails to leave open adequate alternative channels of communication because it impedes their ability to speak at a "conver-

sational distance" with a "unique audience"—women visiting a reproductive health care facility for the purpose of terminating a pregnancy—about perhaps the most fundamentally private decision a woman can make—whether to have an abortion. Pet. Br. 22, 43–44. But the First Amendment does not guarantee anyone the right to have a face-to-face conversation with a particular individual in all places at all times. Instead, it guarantees the right of all individuals to be able to share their message on matters of public concern. And because the Fixed Buffer Zone Laws permit delivery of petitioners' anti-abortion message to the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora, they unquestionably leave open adequate alternative channels of communication.

In conducting its "adequate alternative channel" analysis, this Court need look no further than its prior decision in *Frisby*. In *Frisby*, the Court upheld a municipal ordinance prohibiting the picketing of a particular residence or dwelling. The ordinance was precipitated by targeted picketing outside the home of a physician that was intended to "force [that] doctor to cease performing abortions." 487 U.S. at 487. The Court held that, because the ordinance applied to "picketing [ ] narrowly directed at the household, not the public," it was "virtually self-evident that ample alternatives remain[ed]" for public expression. *Id.* at 483, 486. Put differently, because the ordinance did not impede "the more general dissemination of [the petitioners' anti-abortion] message," *id.* at 483, it was of no moment that the ordinance

might, in fact, make it substantially more difficult for the picketers to reach their target audience.

So, too, here, petitioners assert the right to target a particular audience—women visiting reproductive health care centers for the purpose of terminating a pregnancy—at a location where the target audience necessarily *must* go to exercise a constitutionally-protected right, and where that audience has a strong expectation of privacy.[19] Petitioners contend that, because the Act does not leave open adequate alternative channels for them to speak directly—and up close—with this particular target audience at this particular location, it does not pass constitutional muster. But this argument misses the mark: The relevant question is not whether the regulation

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[19] As this Court suggested in *Madsen*, "the State's strong interest in residential privacy, acknowledged in *Frisby* v. *Schultz*, applie[s] by analogy to medical privacy[:] . . . while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." 512 U.S. at 768 (citations omitted). Of course, the Act and the other Fixed Buffer Zone Laws are not intended solely for the purpose of promoting "medical privacy"—they are also intended to protect the constitutional right of clinic-goers to access reproductive medical information and care, and to protect the safety of all individuals using the public streets and sidewalks. Thus, the question addressed at length by the dissenters in *Hill*—whether individuals have a "right to be left alone" that can ever justify restrictions on speech outside of the residential context, see 530 U.S. at 750–54 (Scalia, J., dissenting); *id.* at 771–72 (Kennedy, J., dissenting)—is not presented here. Moreover, resolution of that question is wholly unnecessary to address the entirely separate question of whether adequate alternative channels of communication exist.

leaves open adequate alternative channels for particular speakers to have one-on-one conversations with particular individuals whom they choose to target. It is whether that law impedes "the more general dissemination of a message." *Frisby*, 487 U.S. at 483. Because petitioners—like all other speakers—are free to share their message through any means or method desired, so long as they are 35-feet from the entrances to a reproductive health care facility, the Act—and the other Fixed Buffer Zone Laws—unquestionably pass this test.

To be sure, proximity to a particular location may sometimes be significant to protesters seeking to convey a particular message. Those protesting a political convention or an international conference have an interest in securing a site for their protest that is reasonably proximate to that event. But reasonable proximity does not mean a conversational distance. See, e.g., *Marcavage* v. *City of Chicago*, 659 F.3d 626, 629, 631 (7th Cir. 2011) (rejecting argument that First Amendment required City of Chicago to allow plaintiffs to situate themselves on the main thoroughfare of the Gay Games in order to make "one-on-one presentation[s] of the Gospel of Jesus" to Games attendees, and holding instead that the alternate locations available to plaintiffs were more than adequate because they "were within view and earshot of those traveling to the Games"); see also *Marcavage* v. *City of New York*, 689 F.3d at 108 (rejecting convention protesters' argument that an adequate alternative channel for communication must be within "sight and sound" of the convention and upholding restriction that required protestors to remain a block or more away from convention site); *Menotti*, 409

F.3d at 1138–39, 1141 (rejecting argument that the First Amendment required the City of Seattle to allow protestors to "communicat[e] with WTO delegates at close range," and holding that protestors restricted from the portion of downtown Seattle where the WTO conference was being held nonetheless had adequate alternative channels available to them because they were permitted to demonstrate across the street from some of the conference locations); *Bl(a)ck Tea Soc'y*, 378 F.3d at 14 (rejecting convention protesters' argument that an adequate alternative channel for communication must be within "sight and sound" of the convention, and observing that, "[a]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access").

In any event, even accepting that anti-abortion protestors have an interest in situating themselves within reasonable proximity to locations where abortions are performed, that interest is not impeded here. The Fixed Buffer Zone Laws unquestionably permit petitioners and other anti-abortion advocates to speak freely within sight and sound of reproductive health care centers. And they unquestionably permit petitioners and other anti-abortion advocates to engage in face-to-face conversations with clinic patients and staff, so long as those conversations take place before the clinic-goers enter the buffer zone or after they leave it. In Massachusetts, for example, petitioners can—and do—position themselves on

public sidewalks just 35 feet from clinic entrances—well within both earshot and eyeshot of the clinics. And from that position petitioners can—and do—engage in any form of expression they wish. They can approach passersby (including individuals heading to or from the facility), they can leaflet, they can call out to individuals entering and exiting the facility, they can picket, they can display signs, and they can pray.

In short, the Act and the other Fixed Buffer Zone Laws do not "limit the range of information and ideas to which the public is exposed," as petitioners contend. Pet. Br. 32 (internal quotation marks and alteration omitted). Instead, they appropriately protect clinic patients, clinic employees, and passersby from the harassment, intimidation, and violence that historically have plagued such facilities, while still leaving open ample alternative channels for petitioners and other anti-abortion advocates to spread their message.

CONCLUSION

Because the Act and the other Fixed Buffer Zone Laws epitomize precisely the type of content-neutral time, place, and manner restrictions that state and local governments must have at their disposal to deal with uniquely local concerns and to protect the significant rights and interests of their residents, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, and NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICAE CURIAE BRIEF OF 12 WOMEN WHO ATTEST TO THE IMPORTANCE OF FREE SPEECH IN THEIR ABORTION DECISIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICAE CURIAE*[1]

Amicae are women who attest to the importance of free speech in their abortion decisions.

Cindy Adams was uninformed about abortion and its consequences. Her abortion clinic told her that it was "only medically doing what your body naturally does every month," it "would be quick and painless" and she would be "back to [her] normal self in a day." Instead, her abortion left her with "a lifetime of regret." Because of the abortion, she "became promiscuous and began drinking heavily . . . to help dull the pain and shame" she felt. She wanted to "die in an accident" rather than face her pain.

Marlynda Augelli had an abortion even though the abortion clinic did not provide "information on the actual life of the child." Her abortion and resulting "tremendous psychological trauma" factored into her first divorce. According to Marlynda, she wishes she "had been told the truth . . . about the life of the unborn . . . [or] childbirth and being a mother." If she had, she says that she "would have never made the choice to end the life of my first child," who "might have been the glue that would have kept my marriage and family together."

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents accompany this brief. No counsel for a party authored this brief in whole or in part. The Judicial Education Project contributed the costs associated with the preparation and submission of this brief.

Nona Ellington was convinced by Planned Parenthood employees to get an abortion because they believed she was too young to have a baby, and her "baby [was] just a blob of tissue." She "never heard any other information about other options, fetal development, or the procedure itself." Nona went through "many years in denial and emotional numbness without much regard for living." For Nona, if someone would have "approached me to help me and give me valuable information as I was walking into the abortion clinic, I probably would not have had an abortion and suffered the horrible consequences for the rest of my life." Nona regretted that she "never knew that abortion might not have been [her] best option." For her, the manner of offering information would have made a crucial difference in her receptiveness, as she "would have ignored people yelling at me from a distance and would have only felt more shame."

Paula Lucas-Langhoff's then-boyfriend forced her into an abortion by threatening her life, and holding her "captive, saying that I could not leave until I had an abortion." The abortion clinic provided "misleading information about the abortion," including that her "baby was only a blob of tissue." She did not know that her "child was basically fully formed, had a heartbeat, and reacted to pain." The night before her abortion, she "wandered the neighborhood looking for someone" to help her, to no avail. The next day, when she tried to back out of the abortion, her doctor "yelled at [her] and said that [she] was 'wasting

his time.'" She "would give anything to change the past," and believes that she would have not had an abortion if she had met a pro-life counselor outside of the clinic. "My baby died because I was alone and had no one to help me." However, at her time of greatest need, she insists that she would not have responded well to "someone that was 35 feet away from the clinic, shouting at me or using a bullhorn."

JM explains that she became pregnant as a college sophomore after a classmate raped her. She "didn't know where to go for help" and didn't know about abortion alternatives, such as crisis pregnancy centers. She says she was pressured by abortion workers to go through with the abortion, even after she expressed doubt about wanting to have an abortion. She "was barely given enough time to read the paperwork" she was required to sign and was troubled that "they never asked to see my medical records." Abortion had very negative consequences for her health. She "spent 19 days in the psychiatric ward of a hospital with major depression, suicidal thoughts, and psychosis" and "[f]or nearly 25 years . . . struggled with chronic anxiety, depression, and feeling worthless." She really "wanted and needed . . . thorough and accurate information," but never received it. As a result, she never made "a real choice, because it wasn't fully informed." If she would have talked with the pro-life counselors that were outside the clinic, she believes that she would have chosen life, and "spared myself and my family 25 long years of having to deal with my health problems, both

emotional and physical, and had a chance at a sound and healthy marriage."

Madonna Medina "had an abortion over 33 years ago, but still remember[s] it as if it was yesterday." She explains that the "people I should have trusted the most pressured me into choosing abortion," including her doctor and her fiancé. Her prayer that pro-life counselors would be outside of the abortion clinic to stop her went unanswered. For Madonna, she "couldn't deny the emptiness [she] felt inside, physically, spiritually and emotionally. She experienced "devastating long-term consequences" from the abortion, and "endured constant thoughts of suicide" as a result.

Jean Pickett had two abortions, at an abortion clinic that "provided [her] with no counseling and no other options." She believes that if she had met a caring pro-life counselor, she might have not had an abortion. A counselor that tried "to frighten me or shout me down" would have been ineffective, however, and if she "had seen someone protesting in a Grim Reaper costume," she "would have thought they should be locked up." Her "abortions did serious damage to my mental and physical health," and caused "emotional instability, anger, and addiction."

Esther Ripplinger had an abortion at age 19, because she says she "did not receive life-affirming information when I asked for it." She asked the clinic staff about the baby's stage of development, and was told "It's only a blob of tissue," but later learned her

baby actually had "hands, feet, and a beating heart." She was also told the procedure was "quick-and-painless" and would only cause "minor discomfort," but she later felt "shocking" and "excruciating pain." She suffered from depression and anxiety from what she called the "worst decision I have ever made" and her "pain and incredible loss" from her abortion will "last[ ] a lifetime." She believes that "[i]f someone had given me information and alternatives as I walked into the clinic, I would not have made this choice." Unfortunately, her memory is only of "people with pictures of dead babies shouting," which she "perceived as not loving and caring for my needs."

Heather Shearfield says that her abortion was a "mistake that would change the rest of my life." The abortion clinic assured her that the baby "was 'tissue' and not a life or even a child." This relieved her, because she was "terrified that this was a child and that my decision was wrong." The abortion caused her to become "the hardest, meanest individual [she] could be, in an attempt to stop the hurting and grieving." For the next 24 years, she drank alcohol and used drugs, and "pursued intoxication with a desperation that [she] didn't recognize in [herself]."

Patti Smith had two abortions, at an abortion clinic that treated "abortions like something as routine as a dental filling," and did not "provide any type of comfort or assurance," or talk about abortion alternatives. After her abortion, she could not look at herself in the mirror, and became "increasingly promiscuous, drank more, and was hell-bent on

self-destruction." She thought suicide was her only way out. According to Patti, if she would have met a pro-life counselor that showed her "love and compassion, I think I would have taken a different path." But, she says that "[i]f there had been people there screaming and holding pictures of aborted babies, I would have walked right by them." Unfortunately, she says that "[n]one of my friends was trying to dissuade me" and she felt that she "had no choice." Thirty years later, she still cries about her abortion.

Susan Swander had three abortions. Susan explains that two took place during "an affair with a married man, who pressured me into an abortion." She said that she never met an abortion clinic employee that "ever mentioned alternatives to abortion to me, or any relevant medical details about the abortion, such as the physical and emotional risks to my health." She was treated as "just a body with . . . cells that [the clinic] would remove." She "suffered for 36 years from depression, guilt, shame, alcoholic drinking, drug use, promiscuity, overeating, and deep-seated anger." She wishes that someone would have told her about her other options before she had her abortions. Even though she says that "[s]omeone outside a clinic with a bullhorn would have made me angry," she maintains that a calm "message about abortion alternatives could have resonated with me" enough so that she might not have had an abortion.

Molly White had two abortions. Before her first abortion, she said that she asked the clinic staff "about the abortion procedure and was told it was a

minor, safe procedure that would 'clean me out' and that it had the same discomfort level as a menstrual cycle." She said that the clinic staff answered her question with "lies and misinformation." Her abortion caused "continual bleeding, a damaged cervix, and uterine scarring," which led to "two stillborn children and a miscarriage." She believes that "[i]f someone had been outside of the clinic offering me help and information, talking face-to-face with me, I would have decided against having the abortion, which was the most regrettable decision of my life."

SUMMARY OF ARGUMENT

Amicae can testify to the difficulties of being in a crisis pregnancy, including the appearance of limited options and consequent feelings of hopelessness. However, they also believe that these difficulties are exacerbated by incomplete and misleading information about the abortion procedure, fetal development, and abortion alternatives, and greatly regret their decisions to have an abortion. The law upheld by the Court of Appeals, MASS. GEN. LAWS ch. 266, § 120E 1/2 (2007) ("the Act"), effectively prevents other women in a similar situation from receiving this information by dramatically limiting the speech of individuals offering abortion alternatives, while leaving ample communication channels for abortion proponents. This discrimination undermines the very essence of the First Amendment by silencing one side

of what may be the most profound and most deeply emotional political and moral debate of our day.

This Court has held repeatedly that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted). Without a vibrant and functioning marketplace, society loses "the best test of truth," which is "the power of [a] thought to get itself accepted in the competition of the market." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). By misapplying this Court's precedents, the decision below undermines the marketplace of ideas by failing to adequately scrutinize a content-based regulation of speech. It also restricts both the ability of speakers to communicate their message, and of willing listeners like *amicae* to access critical information. The decision below is the most extreme decision in a line of lower court cases that have misinterpreted this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), and is in conflict with the Ninth Circuit's decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011).

This curtailment of the First Amendment has very destructive consequences. Forced further away from their intended audience by ever-expanding buffer zones, pro-life educators and counselors, however peaceful, civil and compassionate, are becoming increasingly precluded from delivering their message:

a message that would have been welcomed by audience members such as *amicae*. These buffer zone laws make off-limits to these speakers the only plot of land on earth where their message has any plausible likelihood of achieving its desired effect.

Because the reasoning of the Court of Appeals poses a grave threat to the First Amendment, this Court should intervene and set clear limits on *Hill*'s reach.

ARGUMENT

I. The Act, As-Applied, Is Viewpoint-Based Because It Exempts Clinic Agents And Employees From The Buffer Zone

In analyzing a government restriction on speech, the first question is whether that restriction is content- or viewpoint-based, subjecting the restriction to strict scrutiny, or content-neutral, triggering less exacting scrutiny. *Compare United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (applying strict scrutiny), *with Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting *Clark v.*

Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))). *Hill v. Colorado* does not relieve the Court of performing this analysis by presuming that all buffer zone laws are content- and viewpoint-neutral. On the contrary, *Hill*'s holding of content neutrality was conceded by the parties, and its commentary on viewpoint discrimination was highly fact-based. The Court of Appeals improperly applied *Hill* to the Act as the facts of the Colorado law at issue in *Hill* are in stark contrast with those in the instant case.

In discussing the content-neutrality of the statute in *Hill* this Court was careful to limit its commentary to the specific facts of that case. The Court found significant the fact that the statute only minimally burdened the delivery of the pro-life counselors' message. The statute in *Hill* allowed for a "normal conversational distance," while allowing individuals to either remain in place and pass out literature, or come within 8 feet of clinic patients. *Hill*, 530 U.S. at 726-27 (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997)). Had the statute either imposed a significantly larger bubble, or exempted a particular viewpoint from the bubble's jurisdiction, this Court would have likely reached a different conclusion.[2]

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[2] This supposition is especially probable given the reasoning of the four-Justice concurrence:

> "[T]he reason for [the statute's] restriction on approaches goes to the approaches, not to the content of the speech. . . . [T]he content of the message will survive on

(Continued on following page)

The Court of Appeals' finding of facial neutrality can only be credited at the most superficial level. While in theory an exemption for clinic agents and employees could be neutral, in reality those exempted parties consistently favor abortion ideologically and have strong pecuniary incentives for doing so. Indeed, as the law is written, the exemption for clinic employees and agents is for speech *in the scope of their employment or agency*, which necessarily presents only a favorable perspective toward abortion. This is in stark contrast to the law upheld in *Hill*, which blocked pro-choice and pro-life speech equally. *See Hill*, 530 U.S. at 725 ("The statute is not limited to those who oppose abortion. It applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands").

Clinic representatives need not stand in front of clinics to inform pregnant women of the precise scope of their abortion rights or answer questions about the procedure itself, the safety precautions taken, or their view of its potential after-effects. Such information is readily available on the other side of the clinic's

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> any sign readable at eight feet and in any statement audible from that slight distance. Hence, the implausibility of any claim that an anti-abortion message, not the behavior of the protestors, is what is being singled out."

Hill, 530 U.S. at 738 (Souter, J., concurring).

doors. But pro-life advocates know that if they are unable to deliver their message outside the clinic, prospective clients, like many of the *amicae*, will be unlikely to receive detailed information about the stage of development of their unborn babies, the details of the abortion procedure, or the risks of long-lasting emotional, psychological and even physical harm.[3] The consequences of being prevented from communicating this type of information are immediate and irreversible; there is no second-best result and there are no second chances. *See Hill*, 530 U.S. at 792 (Kennedy, J., dissenting) ("Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur").

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[3] For example, according to the Planned Parenthood website, "Most women ultimately feel relief after an abortion. . . . Serious, long-term emotional problems after abortion are about as uncommon as they are after giving birth." Planned Parenthood, In-Clinic Abortion Procedures, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm (last visited Sept. 9, 2013). Empirical research, however, raises serious doubts about the factual accuracy of such a statement. *See, e.g.*, David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006) (finding a direct correlation between a woman's history of abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health). The testimony of the *amicae* also tends to illustrate that Planned Parenthood's position is not representative of all women.

A viewpoint-based exemption to a neutrally-phrased law, like the exemption from the Act for clinic representatives, is equivalent to a viewpoint-based limit on speech. *See, e.g., Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (holding a general prohibition on picketing except by those involved in a labor dispute to be viewpoint-discriminatory on its face); *see also Hoye*, 653 F.3d at 854 (rejecting facial challenge to abortion clinic buffer zone statute, while upholding challenge as-applied, due to an unconstitutional "content-discriminatory enforcement policy" that effectively exempted clinic representatives from the law). Furthermore, the analysis of whether a speech limitation is neutral, even facially, must go deeper than the Court of Appeals' cursory analysis and address the logical effects of the law. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (the "inevitable effect of a statute on its face may render it unconstitutional" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))).

But, even if the Court of Appeals is correct that the Act is neutral on its face, it is clearly viewpoint-based as-applied, and thus should be subject to strict scrutiny. As Petitioners allege in their complaint, clinic representatives "surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." *McCullen v. Coakley*, 708 F.3d 1, 19-20 (1st Cir. 2013). Petitioners' complaint also alleges that "clinic 'employees and/or agents stand idly on the

public sidewalks and streets inside the [buffer] zone' – sometimes smoking, speaking with each other or on mobile phones, or drinking coffee – 'even when clinic clients are not present.'" *Id.* at 20. Petitioners explain that the law precludes "up-close, gentle conversations, accompanied by smiles and eye contact" requiring "shorter, louder, and less personal exchanges" that are ineffective and render Petitioners "untrustworthy." *Id.* at 30. The decision below even admits that the law "curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," *id.* at 31, and that "patients are not readily accessible to the plaintiffs [in Worcester and Springfield]," *id.* at 33. Petitioners' testimony comports with a number of *amicae*'s declarations, which recount how such strained attempts at communication would have been off-putting to the pregnant woman,[4] whereas a normal conversation could have made a difference in her ultimate choice.[5]

In this sense, the decision below conflicts squarely with that of the Ninth Circuit in *Hoye*, which held a buffer zone to be content-based as-applied because the City of Oakland selectively enforced its statute against pro-life counselors but not clinic representatives. *See* 653 F.3d at 851-52 ("The City's policy of distinguishing between speech that facilitates access

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[4] *See infra* note 6.

[5] *See infra* note 15.

to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction . . . [To do so is] necessarily to distinguish on the basis of substantive content").

The Court should resolve this conflict and clarify that the Colorado statute at issue in *Hill* was treated as viewpoint- and content-neutral only because its restrictions did not significantly burden speech of any viewpoint or subject matter in front of abortion clinics. As *Hill* explained, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 731.

The Massachusetts statute, by contrast, should be declared viewpoint-discriminatory both on its face and as-applied. Unlike in *Hill*, this statute does not apply to all health facilities such as hospitals. *See Hill*, 530 U.S. at 715. Moreover, the Massachusetts legislature specifically targeted only the public property surrounding abortion clinics – where sidewalk counselors have long offered information and support to pregnant women considering abortions – and created such vast no-speech zones that pro-life counselors are for all practical purposes entirely precluded from delivering their message to their intended audience.

Such an expansive speech restriction, applied only to individuals on one side of the abortion debate, is far outside the bounds of *Hill*'s viewpoint-neutrality test and should be invalidated.

II. The Decision Below Ignores The Well-Established First Amendment Right Of Women, Such As *Amicae Curiae*, To Receive Information About Abortion

In affirming the constitutionality of the Act, the Court of Appeals undermined the ability of Massachusetts women to make fully informed choices about abortion. The decision below, unprecedented in its breadth and scope, ignores important First Amendment principles laid down by this Court concerning the right to receive information. Because the rights at stake here are crucial to the purpose of the First Amendment, and because – as the stories of the *amicae* demonstrate – the consequences of their abridgement can be severe, this Court should clarify this right's boundaries.

"It is now well-established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). The purpose of the First Amendment is to ensure that civil society develops a marketplace of ideas so that the truth may be found. *See Sorrell*, 131 S. Ct. at 2674 (recognizing the constitutional "importance of maintaining a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas and experiences'" in order to allow the public to "freely choose a government pledged to implement policies that reflect the people's informed will" (quoting *Red Lion*, 395 U.S. at 390)).

Creating a true marketplace of ideas requires protecting the rights of both speakers and listeners.

Just as a speaker's First Amendment right entails a certain level of access to an audience, *see Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) ("[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention"), so does a listener's right include the right to receive information, *see Martin v. Struthers*, 319 U.S. 141, 143 (1943) (The First Amendment "embraces the right to distribute literature and necessarily *protects the right to receive it*") (emphasis added) (citations omitted). A law that removes a listener's reasonably unfettered ability to know what information is available renders this right practically meaningless, impermissibly burdening the listener's First Amendment rights. *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer").

Nowhere is a robust supply of information more important than in difficult and crucial decisions about abortion, and *amicae* provide clear examples of the profound effects that receipt of information can have on individual choices. This Court has long recognized the importance of women making educated decisions about abortion. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67

(1976) ("The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences"). Women have the right to receive information about abortion from counselors with multiple perspectives on the issue, including those who have no economic interest in abortion, without interference from the state.

The strikingly broad decision of the Court of Appeals ignores the burden the Act places on the rights of women entering reproductive health centers. The Act prohibits a woman from having a conversation, receiving a leaflet, or engaging in any type of communication except with clinic employees and agents within a 35-foot fixed buffer zone in all directions. Unlike the previous version of the statute, which contained an exception for consensual communication, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2000), the current version of the statute prohibits all communication within the buffer zone, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2007). The Act applies to invited and uninvited approaches alike, regardless of how peaceful and welcomed the speech is. Even if a woman entering a clinic affirmatively chooses to communicate with one of the Petitioners, Petitioner could not enter the buffer zone to communicate with her.

By restricting consensual speech, the Act violates the right of women to receive information about abortion. In *Hill v. Colorado*, this Court upheld a buffer zone law that contained an exception for

consensual speech, and indicated that a law without such an exception would raise independent constitutional issues. In upholding that eight-foot floating buffer zone law, this Court was careful to limit its reasoning only to cases where the statute at issue strikes "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of *unwilling* listeners. . . ." 530 U.S. at 714 (emphasis added). This Court repeatedly emphasized the significance of the Colorado law's exception for consensual speech: "it is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a *willing* audience and those that protect listeners from unwanted communication." *Id.* at 715-16 (emphasis added). Despite *Hill*'s repeated admonitions, the Court of Appeals failed to consider the burden the Massachusetts statute placed on the First Amendment right of willing listeners to receive information about abortion procedures. But Massachusetts has no legitimate interest in prohibiting willing listeners from communicating with speakers inside the buffer zone.

It is no answer to say that the women approaching an abortion clinic could walk outside the 35-foot radius created by the ordinance to talk to pro-life counselors. Counselors attempting to communicate with women entering a reproductive health center are effectively prevented by this law from peacefully initiating communications in a conversational tone. From 35 feet away, a conversational voice will be

wholly drowned out by the loud background noise of city streets, even without the intentional attempts by clinic employees and agents to interfere with speech of pro-life counselors attested to by Petitioners. *See McCullen*, 708 F.3d at 19-20 ("plaintiffs aver that 'pro-choice advocates . . . surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature'").

If individuals like Petitioners are prohibited from attempting to approach to initiate a conversation, women like *amicae* will likely never discover that there are people willing to have a calm and rational conservation with them about the consequences of abortion. *Amica* Esther Ripplinger, for example, recalls entering a clinic for her abortion and only being confronted with "people with pictures of dead babies shouting," saying she viewed them "as not loving and caring for my needs." She maintains that "[i]f someone had given me information and alternatives as I walked into the clinic, I would not have made this choice" to have an abortion. Her experience illustrates the inadequacy of the alternatives available to individuals like Petitioners under the Act. Similarly, even though *Amica* Susan Swander wanted to hear about alternatives to abortion, she would not have responded to information unless delivered in a caring, personal way: "Someone outside a clinic with a bullhorn would have made me angry – if I had heard someone screaming at me during my crisis, I

would have probably yelled right back." Instead, she stated that a "message about abortion alternatives could have resonated with me, but I needed someone to talk to me in a calm tone of voice, or a gentle touching of my elbow to ask if they could talk to me."[6]

Further, there is no other source of neutral information about abortion readily available to women who visit reproductive health facilities in Massachusetts. Unlike some other states, Massachusetts reproductive health centers are not required to provide information about the consequences of abortion. *See, e.g.*, OHIO REV. CODE ANN. § 2317.56(B)-(C); 18 PA. CONS. STAT. ANN. § 3208(a)(2); GA. CODE ANN. § 31-9A-4(a)(2). Moreover, given the pecuniary interest

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[6] *See also, e.g.*, Declaration of Nona Ellington ("Although I would have been open to hearing about abortion alternatives, I would have ignored people yelling at me from a distance and would have only felt more shame"); Declaration of Paula Lucas-Langhoff ("Even though pro-life counselors would have helped me, I would not have responded to someone that was 35 feet away from the clinic, shouting at me or using a bullhorn. In my crisis situation I was so focused in my fear that I would not have been able to see a sign being held that far away . . I know that I would not have heard anyone physically at a distance of 35 feet"); Declaration of Jean Pickett ("I did not see pro-life counselors outside of the clinic either time. If I had seen someone protesting in a Grim Reaper costume, I would have thought they should be locked up. That type of protesting is counterproductive and would have only made me become more firmly pro-choice"); Declaration of Patti Smith ("There were no sidewalk counselors outside the clinics for either of my abortions. If there had been people there screaming and holding pictures of aborted babies, I would have walked right by them. If you yell, scream, and holler, that's not going to do anything").

reproductive health-care clinics have in providing abortions, it is eminently sensible to maintain a healthy skepticism regarding the objectivity and forthrightness of clinic personnel when advising patients about the nature of the abortion procedure and its potential risks.

Amicae insist that they needed information and either did not get it from clinic personnel, or were provided with misleading information. For example, several *amicae* were told incorrectly that their abortion would not hurt,[7] causing them to be unprepared for an intensely painful procedure that left several amicae incapacitated or even hospitalized for days.[8] *Amica* Esther Ripplinger described it as "excruciating pain" that left her "gripping for my life, feeling the sting of death in the most tender part of my body as

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[7] *See, e.g.*, Declaration of Cindy Adams ("They had told me that it would be quick and painless, and that I would be back to my normal self in a day"); Declaration of Esther Ripplinger ("the woman told me I would feel 'minor discomfort' and that 'most girls just feel a pinch,' gesturing on her arm"); Declaration of Molly White ("I then asked about the abortion procedure and was told it was a minor, safe procedure that would "clean me out" and that it had the same discomfort level as a menstrual cycle").

[8] *See, e.g.*, Declaration of Cindy Adams ("I had the abortion and was shocked at how painful it was"); Declaration of Paula Lucas-Langhoff ("I stayed 10 days in AZ because I was not well enough to leave [because of the abortion] – and I lost my job because they did not know where I was and I was too weak to call"); Declaration of Madonna Medina ("The abortion was the most horrifying and painful experience of my life").

my baby was sucked out of me with a vacuum device." *Amica* Molly White testified to her surprise when she learned that infertility or difficulty carrying a pregnancy to term were possible side effects of abortion.[9]

Amicae also took issue with the clinic's description of their babies as "only a blob of tissue," and as a result were shocked to later learn that babies at the stage when they had their abortion had hands, feet, and a heartbeat.[10] Others commented that they were not told of options other than having an abortion,

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[9] *See* Declaration of Molly White ("I then asked about the abortion procedure and was told it was a minor, safe procedure. . . . My abortions . . . gave me two stillborn children and a miscarriage").

[10] *See, e.g.*, Declaration of Cindy Adams ("I learned that a heartbeat can be detected as early as 18 to 22 days after conception – younger than my baby when I had my abortion. I was so shocked to learn this I cried for a couple of hours. Obviously this medical fact was not shared with me by the abortion clinic I went to"); Declaration of Esther Ripplinger ("I asked the [abortion clinic employee] about the baby's stage of development. 'It's only a blob of tissue,' she said"); Declaration of Nona Ellington ("[Planned Parenthood] told me that at this stage of only 5 weeks of pregnancy, 'it' was only a blob of tissue"); Declaration of Paula Lucas-Langhoff ("On the first day, I asked for more information, but was instead given misleading information about the abortion. I was told by the clinic counselor that the baby was only a blob of tissue and a mass of cells. . . [I] did not know that my child was basically fully formed, had a heartbeat, and reacted to pain"); Declaration of Heather Shearfield ("[A] lady [from the abortion clinic] assured me that this was 'tissue' and not a life or even a child"); Declaration of Molly White ("I did want information so when I arrived at the clinic I asked about the fetal development of my baby (6-8 weeks) and was told it was just a tiny blob of tissue").

although they would have welcomed information about resources and support for pregnant women.[11] *Amica* Paula Lucas-Langhoff in particular testified that when she told the doctor at the clinic that she did not want an abortion, he berated her for wasting his time and bullied her into going through with the abortion.[12] Their experiences all illustrate the danger of leaving the abortion clinic and its agents as the

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[11] *See, e.g.*, Declaration of JM ("I didn't know where to go for help. I hadn't heard of a crisis pregnancy center, and didn't know of any maternity homes in my area"); Declaration of Jean Pickett ("Again, they provided me with no counseling and no other options"); Declaration of Esther Ripplinger ("I had an abortion because I did not receive life-affirming information when I asked for it . . . I was not made aware of the many community services available for pregnant women"); Declaration of Patti Smith ("I wish someone had simply said, 'Can I talk to you for a minute before you go in, because maybe there are options you haven't considered.' None of my friends was trying to dissuade me, and the abortion clinic didn't give me other options. I felt that I had no choice"); Declaration of Susan Swander ("No clinic employee ever mentioned alternatives to abortion to me. . . . I wish there had been someone there to tell me about my options before I had my abortions"); Declaration of Molly White ("Neither did I have any information about abortion alternatives or crisis pregnancy centers where I could go for information and help").

[12] *See* Declaration of Paula Lucas-Langhoff ("When I finally got up the courage to tell the doctor and nurse that day that I did not want an abortion, the doctor yelled at me, and said that I was 'wasting his time.' . . . I pleaded with them at first, in tears, but finally submitted to the doctor, because I had grown up in a household of abuse, and was not equipped to defend myself without anyone else on my side"); *see also* Declaration of JM ("The abortion workers pressured me to go through with the abortion, even though I expressed doubt to them").

sole purveyors of information to women in such a vulnerable situation.

While the First Amendment does not require that states provide women with information about fetal development or the alternatives to and potential side-effects of abortion, it does protect those third-party entities that want to share that information. Because Massachusetts does not require the dissemination of this information and because abortion clinics themselves are not neutral sources of information, it is especially crucial that the government not impede third parties, such as Petitioners, from making this information available to women considering an abortion.

The Court should address these issues because serious consequences result when women decide to terminate their pregnancies without full information. The right to receive information about abortion should receive special attention because of "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion). As Justice Kennedy observed in his dissent in *Hill*, there is "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time," 530 U.S. at 792, than the abortion protester seeking to inform a vulnerable and often distraught young woman of the true nature of, and alternatives to, the irrevocable decision she is about to make.

The stories of *amicae* demonstrate that some women experience deep regret when they choose to abort a child without knowing all the facts. Several *amicae* attest they have suffered psychologically and, in some cases, physically, as a result of abortion decisions made with incomplete, misleading, or false information.[13]

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[13] *See, e.g.*, Declaration of Cindy Adams ("I became promiscuous and began drinking heavily, doing anything to help dull the pain and shame that I felt. I also did what I could to prevent myself from becoming pregnant, as I felt I was unworthy of having another child. I prayed that God would let me die in an accident so I would not have to continue feeling so much pain"); Declaration of Marlynda Augelli ("I was riddled with guilt and remorse and there was nothing I could do to stop those feelings. . . ."); Declaration of Nona Ellington ("I spent many years in denial and emotional numbness, without much regard for living"); Declaration of JM ("My abortion brought devastating consequences. Seven months after my abortion, I spent 19 days in the psychiatric ward of a hospital with major depression, suicidal thoughts, and psychosis. For nearly 25 years, I've struggled with chronic anxiety, depression, and feeling worthless"); Declaration of Madonna Medina ("I did anything to dull the pain – turning to drinking and drug use – and felt like I had lost my sanity; all it took to lose control was hearing a baby cry or children sing. I endured constant thoughts of suicide"); Declaration of Jean Pickett ("My abortions did serious damage to my mental and physical health. They took a toll on my friendships and romantic relationships, and caused emotional instability, anger, and addiction"); Declaration of Heather Shearfield ("From that moment on I became the hardest, meanest individual I could be, in an attempt to stop the hurting and grieving. . . . I had drank and used drugs prior to this, however now I meant business. I pursued intoxication with a desperation that I didn't recognize in myself. And this lasted for the next 24 years. . . . The desperation, depravity, remorse,

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The experiences of *amicae* are representative of the experiences of many women. Empirical research on the psychological effects of abortion suggests that a woman who has undergone an abortion may face a number of difficulties. There is a direct correlation between a woman's history of abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health. *See* David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006). A number of other studies have also found similar correlations.[14]

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regret and shame I lived through I cannot even begin to describe"); Declaration of Patti Smith ("After my first abortion, I became increasingly promiscuous, drank more, and was hell-bent on self-destruction. . . . I also punished myself for the abortions, by having a tubal ligation and thus surgically removing my ability to have a child. Fifteen years ago, my perceived depravity made me incapable of looking myself in the mirror, so I believed suicide was the only alternative"); Declaration of Susan Swander ("I suffered for 36 years from depression, guilt, shame, alcoholic drinking, drug use, promiscuity, overeating, and deep-seated anger"); Declaration of Molly White ("My abortions caused me continual bleeding, a damaged cervix, and uterine scarring, which gave me two stillborn children and a miscarriage").

[14] *See, e.g.*, M. Gissler et al., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, 15 EUROPEAN J. PUB. HEALTH 459 (2005) (suicide); P.K. Coleman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009*, 199 BRITISH J. PSYCHIATRY 180-86 (2011) (mental health); W. Pedersen, *Childbirth, abortion and subsequent substance use in young women: a population based longitudinal study*, 102 ADDICTION 1971-78 (2007) (drug use).

The stories of the *amicae* demonstrate that these consequences can, in some cases, be prevented if the state merely steps out of the way and allows the kind of rational moral discussion protected by the First Amendment to occur. Several *amicae* assert that they would not have chosen to have an abortion had they received accurate information.[15]

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[15] *See, e.g.*, Declaration of Cindy Adams ("If [pro-life counselors] had been there to share the truth, then I would have been blessed with the opportunity to see my only biological child"); Declaration of Marlynda Augelli ("I did not receive . . . any information . . . about the risk of physical and psychological side effects. . . . If I had heard the risks beforehand, I could have made an educated decision and I would not have aborted my child"); Declaration of Nona Ellington ("If someone would have approached me to help me and give me valuable information as I was walking into the abortion clinic, I probably would not have had an abortion. . . . I just never knew that abortion might not have been my best option"); Declaration of Paula Lucas-Langhoff ("That night, the night before the abortion, I wandered the neighborhood looking for someone, anyone that I could talk to who could help. . . . I would give anything to change the past. If pro-life counselors had been outside the abortion clinic that evening, my child would be alive today, but I was too young and frightened to know what to do. . . . My baby died because I was alone and had no one to help me"); Declaration of JM ("What I really wanted and needed in the midst of my crisis, was thorough and accurate information. Instead, my choice wasn't a real choice, because it wasn't fully informed"); Declaration of Esther Ripplinger ("If someone had given me information and alternatives as I walked into the clinic, I would not have made this choice"); Declaration of Patti Smith ("There were no sidewalk counselors outside the clinics for either of my abortions. . . . [I]f there was someone showing me love and compassion, I think I would have taken a different path. . . . [T]he abortion clinic didn't give me other options. I felt that I had no

(Continued on following page)

Amicae's experience is consistent with that of Petitioners. For example, Petitioner McCullen attests to persuading around 80 women to choose to continue their pregnancies, while Petitioner Zarrella recounts the same for more than 100 women. Pet. 14-15. These stories illustrate the impact free speech can have on a woman's decision-making process. Information about abortion can have a life-altering effect, and the government should not deny a woman the opportunity to receive it.

III. The Act Violates The First Amendment By Leaving Sidewalk Counselors Without An Adequate Channel To Communicate Their Messages

The decision of the Court of Appeals also puts an impermissible burden on the First Amendment rights of would-be sidewalk counselors and all individuals, including *amicae curiae* and Petitioners, who wish to speak peacefully to women visiting reproductive

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choice"); Declaration of Susan Swander ("I wish there had been someone to tell me about my options before I had my abortions. . . . If someone had given me correct information about my babies, post abortion trauma, and abortion alternatives, I truly believe I might have made different choices – my 3 children might be alive today"); Declaration of Molly White ("I believe my children would be alive today if there had been sidewalk counselors in front of the clinics where I went to have an abortion. If someone had been outside of the clinic offering me help and information, talking face-to-face with me, I would have decided against having the abortion, which was the most regrettable decision of my life").

health clinics. Even if the Court of Appeals is correct that the Act is a time-place-manner restriction, it is a restriction that clearly fails to leave open alternative channels of communication as required by *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). In upholding the Act, the Court of Appeals assures us that Petitioners' "voices are audible" and placards are visible from 35 feet away, while reminding us that Petitioners may still pray, use sound amplifiers, "congregate in groups outside a clinic" "employ symbols," "wear evocative garments," and "don costumes." *McCullen*, 708 F.3d at 31. This excises from the First Amendment the right to engage in rational discourse, preserving only a vulgar right to shout at distant passers-by. The *Hill* Court, on the other hand, found significant that Colorado's 8-foot buffer zone still "allows the speaker to communicate at a 'normal conversational distance.'" *Hill*, 530 U.S. at 726-27 (quoting *Schenck*, 519 U.S. at 377). Most abortion counselors are understandably not interested in shouting slogans in the vicinity of an abortion clinic; they instead aim to discuss the dangers of abortion with those contemplating the decision to have one.[16] Some ideas cannot be shared through simplistic T-shirt slogans or shouted over bullhorns.

Likewise, the Court of Appeals' insistence that "as long as a speaker . . . [may] reach her intended

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[16] *Amicae*'s declarations support Petitioners' belief that their message is less effective when delivered only through shouting at women from a distance. *See supra* note 4.

audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication," is problematic on at least two levels. *McCullen*, 708 F.3d at 31. First, this Court's discussion of handbilling in both *Schenck* and *Hill* suggests that there is some limited right to engage in certain forms of communication that lie "at the heart of the First Amendment," and that merely offering alternate means of communication is therefore not necessarily an adequate alternative. *Schenck*, 519 U.S. at 377; *see also Hill*, 530 U.S. at 727 ("The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients," explaining that handbillers may still "stand[ ] near the path of oncoming pedestrians" to hand out their material instead). Indeed, this Court has described "handing out leaflets in the advocacy of a politically controversial viewpoint" as "the essence of First Amendment expression," adding that "no form of speech is entitled to greater constitutional protection. . . ." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

This Court also suggested in *Hill* that the availability not of alternate means of speaking altogether, but of handbilling in particular, even proffering handbills to unwilling recipients, was important. Thus it noted that a speaker offering handbills could still "stand[ ] near the path of oncoming pedestrians and proffer[ ] his or her material, which the pedestrians can easily accept." 530 U.S. at 727. Under the

Act, handbilling would be rendered virtually impossible because of the distance counselors are required to stand from entrances, putting them well outside the "path of oncoming pedestrians." *Id.*

The Court of Appeals' hasty dismissal of a speaker's right to use her preferred method of communication further ignores the fact that some communication methods do carry unique features, as this Court taught in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Just as a lawn sign is a "venerable means of communication that is both unique and important," *City of Ladue*, 512 U.S. at 54, so normal conversation carries a particular message of caring and personal respect that shouting or distant picketing with signs or costumes could not convey.

While on its face the Act may appear to merely forbid certain *means* of communication by banning speech by non-clinic employees or agents within a 35-foot radius, as applied it can prevent *all* communications about abortion alternatives. For example, the Court of Appeals acknowledged that patients at both the Worcester and Springfield clinics were "not readily accessible to the plaintiffs" due to the location of clinic entrances in relation to the buffer zone. *McCullen*, 708 F.3d at 33. The practical difficulty – and at times impossibility – of initiating conversation with women squarely conflicts with *Hill*, which underscored that "the First Amendment protects the right of every citizen to 'reach the minds of *willing* listeners and to do so there must be opportunity to win their attention.'" *Hill*, 530 U.S. at 728 (quoting

Kovacs, 336 U.S. at 87) (emphasis added). The question, ultimately, is whether the First Amendment protects merely the right to cheer for one's own team or whether it protects the right to a fair opportunity for persuasion through the free exchange of ideas. We respectfully ask this Court to re-affirm the latter protection.

Finally, by forbidding *all* non-clinic-based speech in a fixed area, the Act "burden[s] substantially more speech than is necessary to further the government's legitimate interes[t]" in promoting public health and safety. *Ward*, 491 U.S. at 799. This intrusion is not necessary to achieving their statutory goal of increasing "public safety at reproductive health care facilities." 2007 Mass. Adv. Legis. Serv. 155. In fact, by the time of the law's passage in 2007, there had been no adjudicated violation of Massachusetts' previous less restrictive buffer zone law, or even from 2000 to 2007, "prosecution during that period under any state, federal or local law directly targeting violence, obstruction, intimidation, trespass, or harassment at abortion clinics in Massachusetts." Pet. 6.

While the *Hill* Court did state that a speech restriction "may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal," 530 U.S. at 726, it did not eliminate this tailoring requirement altogether. *Hill* explains that a time, place, or manner restriction must be "narrowly tailored to serve the government's legitimate, content-neutral interests." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*,

491 U.S. at 798). It pointed specifically to the way that speech was still possible under the Colorado statute at issue:

> the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in *Schenck*, demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

530 U.S. at 729-30. The Court of Appeals, on the other hand, completely failed to address how a rule excluding those silently distributing leaflets, standing in place with signs, or engaging in consensual conversations, from a much larger fixed zone is remotely related to – let alone tailored to – the asserted governmental interest in public safety.

The Court of Appeals also misread *Hill* by failing to take into consideration a crucial caveat to this Court's discussion of narrow tailoring: that the lower bar for narrow tailoring only applied to a "content-neutral regulation [that] does not entirely foreclose any means of communication." *Hill*, 530 U.S. at 726. Even if the Court of Appeals is correct that the Act is content-neutral, it clearly forecloses certain means of communication, including handbilling as discussed

above, and thus is materially different from the type of regulation discussed in *Hill*.

CONCLUSION

For the foregoing reasons, as well as those expressed in Petitioners' brief on the merits, *Amicae* request that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: September 13, 2013

APPENDIX

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App. 1

Declaration of Cindy Adams

I **CINDY ADAMS**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had an abortion in 1985. I was pro-choice then and saw my child as only a potential life.

3. When I became pregnant, my boyfriend told me it wasn't the right time for us to have a child, and there would be plenty of time for us to have a family. I agreed without putting any thought into this decision because I believed it was not yet a baby. I was barely 6 weeks pregnant, and had no physical reasons to know that anything was going on inside my womb. The abortion clinic's counseling consisted of telling me that an abortion was only medically doing what your body naturally does every month and asking whether this was what I wanted to do.

4. I had the abortion and was shocked at how painful it was. They had told me that it would be quick and painless, and that I would be back to my normal self in a day. I spent the next couple of days on the couch crying from pain and from a sense of depression. I felt more shame and fear of someone discovering what I had done than I had felt about someone discovering that I had premarital sex and had gotten pregnant. I didn't understand what was happening to me. I convinced myself that it would pass and pretended life was normal and happy. About eight months later I had a dream where I saw my baby boy.

I was holding him in my arms, and we were lovingly gazing at each other. He was so beautiful. When I awoke, I was convinced I had just seen my son.

5. My life from this point was filled with destructive behavior. As is normally the case, the father and I did not stay together. I became promiscuous and began drinking heavily, doing anything to help dull the pain and shame that I felt. I also did what I could to prevent myself from becoming pregnant, as I felt I was unworthy of having another child. I prayed that God would let me die in an accident so I would not have to continue feeling so much pain. My shame kept me from seeking the help that I needed.

6. A couple of years after the abortion, I shared my abortion story with a friend and began the process of forgiving myself. Forgiveness came, but my shame stayed for 23 years. After a failed marriage and more drowning in despair, I turned to faith in 2007, and finally experienced forgiveness and freedom from shame. I began reading, researching, and getting as informed as possible about abortion. It was during this research that I learned that a heartbeat can be detected as early as 18 to 22 days after conception – younger than my baby when I had my abortion. I was so shocked to learn this I cried for a couple of hours. Obviously this medical fact was not shared with me by the abortion clinic I went to.

7. I will mourn my son and the lost opportunity of motherhood for the rest of my life as I have always wanted children. I know that my son, Francis McKinley,

knows that I love him and that I was blind to the truth of when life actually begins. In memory of my beloved son, I will not be silent about the truth that life begins at the moment of conception.

8. I now stand on the sidewalks outside our local abortion clinic in an attempt to prevent the killing of more innocent unborn babies and to save their parents from the pain and suffering I experienced, and from a lifetime of regret. Besides peacefully praying, we try to offer women fetal development information, support, and options that will not result in the killing of their child. If we are not there to provide this information, then their only source will be the deceptive Planned Parenthood website that attempts to minimize the number of women who regret their abortions and to whitewash the abortion procedure itself.

9. I wish that the loving people that I now stand with outside our local abortion clinic had been at the abortion clinic that I walked into over 28 years ago. If they had been there to share the truth, then I would have been blessed with the opportunity to see my only biological child.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 5th day of September, 2013

MADISON, ALABAMA

/s/ Cindy Adams

App. 4

Declaration of Marlynda Augelli

I **MARLYNDA AUGELLI**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. When I had my abortion I was a married woman and 26 years old. It was 1974 and legal abortion was very new in our society and at that time there was no information on the pro-life side, only this wonderful new "freedom to choose" that women were being given.

3. I went to a private doctor for my abortion. The doctor treated me well, very professionally and gently but gave me no information on the actual life of the child.

4. He was the "doctor" and I was his patient. He was an ob/gyn and delivered far more babies than he aborted at that time in his career. I'm sure if I was to meet the man today he would probably say he was duped like the patients he treated.

5. I wish that I had been told the truth because if I had known anything about the life of the unborn or if I had a clue at that time about childbirth and being a mother I would have never made the choice to end the life of my first child.

6. A few years later nothing had changed in my circumstances but my heart had changed. I became pregnant again and today I have a 26-year-old daughter who is now the mother of three children. I now

have 4 children and 3 grandchildren. I was one of the lucky ones. I was able to have other children. I had no physical side effects that I am aware of.

7. I did have tremendous psychological trauma, which ultimately was a factor in my divorce from my first husband the father of the child that wasn't one of the lucky ones. Today I speak out against abortion because I personally have experienced the aftermath and destruction of abortion on the family and society.

8. If given the choice again I would today have a thirty one year old child that I believe would have been a first born son. That child might have been the glue that would have kept my marriage and family together. He might have been the one to change the whole course of the history of our family.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 11th day of September, 2013

MT. JULIET, TN

/s/ Marlynda Augelli

App. 6

Declaration of Nona Ellington

I **NONA ELLINGTON**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had an abortion at age 15 and in the 10th grade. After being forced into sexual intercourse with my boyfriend, I realized after a few weeks that I was pregnant. My boyfriend and I had already broken up.

3. I went to a Planned Parenthood in Houston, TX to get a 'free' pregnancy test to confirm that I was pregnant. They told me that at this stage of only 5 weeks of pregnancy, 'it' was only a blob of tissue. They also suggested that I could have an abortion, since I was so young and still in school. I agreed. My sister and several friends at school all thought it was really 'no big deal, people do it all the time, especially since you're still in school,' and I thought it would be terrible to try to go to school pregnant.

4. I was overwhelmed by shame and guilt, even before the abortion. When I told my ex-boyfriend that I was pregnant and needed money for an abortion, he denied that he was the father, which deepened my shame.

5. Around Oct. 1983, my Mom and sister took me to a local abortion facility. I don't remember seeing any protestors outside. When I got there, I went into a room by myself with a lady that was telling me that I may lose the ability to have children after the abortion because of my age and small size. I didn't really

care because I was not thinking of ever getting married or having children at age 15. She also told me that my baby is just a blob of tissue. I never heard any other information about other options, fetal development, or the procedure itself. While the nurse was giving me the anesthesia, I heard my mother's voice at the door. She said "is my daughter in there?" The nurse told her "you can't come in here ma'am, you need to go back to the waiting room." I believe my Mom was trying to stop what was happening. I also believe that if she would have heard what the counselor told me about never having children, she would have taken me out of there

6. The abortion was extremely painful. I remember hearing the roar of the vacuum machine sucking my insides out. It felt like I was being ripped apart. It was the most horrible experience I have ever been through. After the abortion, they took me to a recovery room, gave me juice and crackers, and had me lay down after giving me a pad for the horrible bleeding.

7. Almost immediately after the abortion, I spiraled into a very destructive lifestyle of drugs, alcohol and promiscuous sex. I was completely spiritually void, rebelling against my Christian upbringing. I spent many years in denial and emotional numbness, without much regard for living. As I was going through the motions, trying to fill this huge void within me, I attached myself to an abusive relationship less than a year after the abortion, as a result of extremely low self-esteem. I also attempted suicide as a result of recurring depression.

8. The abortion ruined all chances of having children. During my marriage of 18 years, I suffered 5 miscarriages, with 3 of them being tubal pregnancies which required emergency surgery and very near death experiences. I am unable to have children. My abusive marriage ended in divorce, but I am free from the abuse I suffered from years of low self-esteem. I so wanted an 'atonement' baby to make up for the one I killed.

9. If someone would have approached me to help me and give me valuable information as I was walking into the abortion clinic, I probably would not have had an abortion and suffered the horrible consequences for the rest of my life. They could have taken me to a pregnancy center, or given me a sonogram so I could see my baby and hear the heartbeat. I just never knew that abortion might not have been my best option. Although I would have been open to hearing about abortion alternatives, I would have ignored people yelling at me from a distance and would have only felt more shame.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 6th of September, 2013

HOUSTON, TEXAS

/s/ Nona Ellington

App. 9

Declaration of Paula Lucas-Langhoff

I **Paula Lucas-Langhoff**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had a forced abortion in 1981 at age 19, when I was 11 and a half weeks pregnant.

3. My then-boyfriend forced me into getting an abortion in Arizona over Christmas, when I was visiting him from Illinois. When I arrived in Arizona, he threatened our future together and picked up a handgun and pointed it at me. I felt afraid and my life threatened when he gave me an 'or else' ultimatum. After he took away my plane ticket, money, and his car keys, he held me captive, saying that I could not leave until I had an abortion.

4. I went to the abortion clinic twice. I entered the clinic with fear and trepidation and had no intention of getting an abortion. I thought the clinic workers would help me consider all my options. Instead, the first thing they wanted was their $350. They did not want to know how I was doing or whether I was sure I wanted an abortion.

5. On the first day, I asked for more information, but was instead given misleading information about the abortion. I was told by the clinic counselor that the baby was only a blob of tissue and a mass of cells, and that I was too young to raise a child on my own. She also told me I had just 3 days to decide because at 12 weeks the 'embryo' would become a baby and

they would not do the procedure. I believed them when they said it was not a baby, and did not know that my child was basically fully formed, had a heartbeat, and reacted to pain. She told me the procedure was "easy" and that it would "take care of" the "problem."

6. The first day they inserted a seaweed tampon-like device to dilate my cervix. I was told I would have "cramping" and that the next day I would come back so the doctor could "clean me out" using vacuum suction. When I got home I tried to remove the device in the bathtub, but couldn't reach it. That night, the night before the abortion, I wandered the neighborhood looking for someone, anyone that I could talk to who could help. I considered whether I should knock on a stranger's door. I looked for a police patrol car but there was none.

7. My boyfriend drove me to the abortion clinic on the day of the abortion, and I was looking out the window to determine if I would survive jumping out of the moving vehicle. I went into the abortion clinic frightened and determined not to have the abortion.

8. When I finally got up the courage to tell the doctor and nurse that day that I did not want an abortion, the doctor yelled at me, and said that I was "wasting his time." They said they had lots of girls lined up waiting. I pleaded with them at first, in tears, but finally submitted to the doctor, because I had grown up in a household of abuse, and was not

equipped to defend myself without anyone else on my side.

9. They punctured my amniotic sac with a huge needle. I was lied to and had been told that I was being "given a para-cervical block" injection to numb the pain, but it was actually what they used to kill my child. There was a lot of pain throughout the procedure and I wanted to die. After I endured the procedure, I was forced to lie on the table for 15 minutes with the lights turned off, next to a glass suction container that held the fluids and body parts of my child, including what looked like my child's foot pressed up against the glass. They came to get me and told me I had to leave because they "needed the room." I had lost so much blood that I fainted on the elevator on the way out, and 3 days later I had a massive infection that required antibiotics.

10. I stayed 10 days in AZ because I was not well enough to leave – and I lost my job because they did not know where I was and I was too weak to call. When I was finally allowed to leave, I cried throughout the entire three-hour flight. While I have forgiven my ex-boyfriend, he still cannot forgive himself, and it nearly destroyed both of us.

11. I would give anything to change the past. If pro-life counselors had been outside the abortion clinic that evening, my child would be alive today, but I was too young and frightened to know what to do. Sidewalk counselors could have been my chance to get out of the abortion, and could have rescued me from a

forced abortion. My baby died because I was alone and had no one to help me.

12. Even though pro-life counselors would have helped me, I would not have responded to someone that was 35 feet away from the clinic, shouting at me or using a bullhorn. In my crisis situation I was so focused in my fear that I would not have been able to see a sign being held that far away.

13. I know that I would not have heard anyone physically at a distance of 35 feet; my house is 40 feet wide and I can't hear my husband when he shouts from the kitchen. I also wouldn't have been able emotionally to hear a message shouted from 35 feet away, I was so lost in my own thoughts. I needed a caring individual to compassionately come up to me face-to-face on my way into the clinic, tap me on the shoulder, and say something like "Hey sweetie, can I just have a moment of your time, and tell you about some other options?" That could have saved my child.

14. I will be 52 years old this year. More than 30 years after my abortion, there is not a day that goes by that I don't think of my baby and what kind of life we could have had. I have carried the burden of regret and shame for most of my life because of a supposed 'choice.' What choice did I and my baby have? The answer is that we were given no choice. A single pro-life counselor could have saved our lives.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 8th day of August, 2013

HUSTISFORD, WISCONSIN

/s/ Paula Lucas-Langhoff

App. 14

Declaration of JM

I **JM**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I became pregnant is 1988, as a sophomore in college, after a classmate raped me.

3. I was traumatized and scared, especially after I suspected that I was pregnant. I went to a family planning clinic – the only place I knew to go – which confirmed my pregnancy and told me I could seek adoption or have an abortion. They did not give me any details about either option that day.

4. I returned a few days later and told them that I had chosen an abortion. All the clinic gave me was contact info for the abortion clinic, and a warning to get there early to avoid the "protesters" – peaceful sidewalk counselors and women who regretted having abortions in that facility.

5. I chose abortion even though I thought it takes a life, because I was afraid of my rapist, who tried to intimidate me into silence, and I resented how unfair my situation was. I was also afraid of being tied to the perpetrator for life if he knew he had fathered my child, and I was afraid of my parents' reaction, what others would think of me, and of getting behind in school. I didn't know where to go for help. I hadn't heard of a crisis pregnancy center, and didn't know of any maternity homes in my area. My decision to abort was especially heart-wrenching and difficult

because my birth mother put me up for adoption instead of choosing abortion when she had her own crisis pregnancy.

6. I got there early to avoid the "protestors" as advised. The abortion workers pressured me to go through with the abortion, even though I expressed doubt to them. When the sidewalk counselors arrived, the staff ridiculed the "protesters," saying it was easy for them to tell us not to abort when they've already had their abortions in their facility. I was barely given enough time to read the paperwork that I had to sign for the abortion, and they never asked to see my medical records. They herded us – the more than 30 women that were there for an abortion – all like cattle into a long, narrow hallway and stairwell where we got in line for our "procedure." As I looked down from the upstairs window and watched the two sidewalk counselors holding up their signs and talking kindly and peacefully with people coming in the doors, I kept wanting to back out, I wished I could go talk to them, but the long and narrow hallway packed with young women (that I would have to physically push my way through to get out) made me feel trapped. As we waited to undergo what the workers kept referring to as a "procedure", we didn't say much. We just kept justifying to each other why we needed this abortion.

7. Once on the table, the doctor didn't speak to me except to tell me what he was going to do during the 'procedure.' He never looked me in the eye. The experience was painful, and agonizing emotionally.

Thinking about what was happening to my baby was almost unbearable. Afterwards, the doctor directed me to the dressing area where there were several other girls dressing to leave. All of us were silent. None of us made eye contact.

8. When I got back to my dorm room, I was traumatized to see that I had passed parts of my baby's dead body. No one prepared me for this possibility or how it would affect me. Even today, 25 years later, I can't erase that sight from my mind. Being raped and then being pregnant as a teen were traumatic enough, but seeing the visible and painfully real effects of my "choice" was more than I could take. Abortion didn't annul my pregnancy, it made me the mother of a dead baby, and I couldn't deny that, especially after seeing it with my own eyes.

9. My abortion brought devastating consequences. Seven months after my abortion, I spent 19 days in the psychiatric ward of a hospital with major depression, suicidal thoughts, and psychosis. For nearly 25 years, I've struggled with chronic anxiety, depression, and feeling worthless. My husband and I have also spent well over $100,000 battling my physical health problems that are very likely related to PTSD or in this case, Post-Abortion Syndrome. I was diagnosed first with a viral syndrome, then an autoimmune disorder and chronic fatigue, a neurological form of sleep apnea, migraines, heart problems and more.

10. We've also spent thousands of dollars and hours on counseling for me, and I've reached out for free

help at the local pregnancy center to do the "Forgiven and Set Free" Bible study three separate times. I've made some poor choices with my relationships because I've struggled with believing I didn't deserve to be treated well after what I had done to my baby. I struggle with expecting perfection from myself, and I have difficulty setting and reaching goals and following through with tasks.

11. Because of this, and my fatigue and my other health problems, I've left many other things in my life undone, and I've let my loved ones down repeatedly. My husband and I have sought marriage counseling many times, and are in counseling today. I often fight fears that something bad will happen to my children and so I also struggle with being overprotective of them. I wished I had known safe people to go to for help after I had been raped. I wish I had known of a place go where they would have given me accurate and complete information about abortion and the alternatives available to me. I wish I had known where to find help and loving support for me and my baby in my crisis.

12. Although God is setting me free from the guilt, shame, and fear I've suffered with for so long after making this decision, I wish with every fiber of my being I could take it back. What I really wanted and needed in the midst of my crisis, was thorough and accurate information. Instead, my choice wasn't a real choice, because it wasn't fully informed. I'm sure those two women outside of the clinic were having a similar experience and simply wanted me to be fully

informed and loved as they (and I) were not. I needed real doctors and counselors, and people to love me and places to go for help me for me and my baby.

13. I still wonder if I had had the courage to follow through with what I was wanting to do: leave the abortion facility and go outside and talk to those sidewalk counselors against the abortion workers' urging. Would I have changed my mind, and given my baby life and myself dignity and respect? If I had I gotten there after the sidewalk counselors had arrived, would they have given me the information and encouragement I needed to make a more informed and courageous choice? Would I instead have given life to the innocent baby I was carrying against my consent? I believe I would have. I may have spared myself and my family 25 long years of having to deal with my health problems, both emotional and physical, and had a chance at a sound and healthy marriage.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 11th day of September, 2013

TEMPLE, TX

/s/ JM

App. 19

Declaration of Madonna Medina

I **MADONNA MEDINA**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had an abortion over 33 years ago, but still remember it as if it was yesterday.

3. I knew I was pregnant and was very happy about a new life growing inside of me. Of course there would be changes and I was ready for it. I was choosing life for my very first baby! Unfortunately, the people I should have trusted the most pressured me into choosing abortion.

4. I was not prepared for what I would encounter at my Obstetrician/ Gynecologist. The nurse confirmed my pregnancy with a grave voice by saying, "You're pregnant! What are you going to do about it?" She then told me that I could always have an abortion, it was an easy procedure, I was young and had my whole life ahead of me. The nurse said that since I wasn't married, I would live a hard life as a single mother and would always be poor. The doctor reiterated the same thing to me, and they bombarded me with "facts and statistics" that they thought would convince me to choose an abortion. I left his office that day in tears, resolving to never return.

5. A few weeks later, the father of my unborn child, my fiance, changed his mind and said that he wanted me to get an abortion and that we could "have as many children as we want when we get married."

6. Feeling helpless, confused and trapped, I again found myself in the doctor's office, the day before the abortion. The nurses were shocked that the doctor was going to perform an office procedure at almost 14 weeks and suggested I drink a bottle of wine before coming in the following, morning to block the pain.

7. When I went to the abortion clinic the next morning, my prayers for someone to stop me went unanswered – there were no pro-life counselors outside of the clinic.

8. The abortion was the most horrifying and painful experience of my life. I was fully awake during the whole abortion. I wanted to say STOP the moment the procedure began but it was too late. After what seemed like an eternity, it was over. I looked over to my left at the big glass jar and saw the tiny dismembered limbs of my baby floating in a sea of blood. That image plagued me for many years to come. I couldn't deny the emptiness I felt inside, physically, spiritually and emotionally. Abortion had devastating long-term consequences for my life. My relationship with the baby's father soon ended. I did anything to dull the pain – turning to excessive drinking and drug use – and felt like I had lost my sanity; all it took to lose control was hearing a baby cry or children sing. I endured constant thoughts of suicide.

9. My life did not change until 18 months later, when I found faith, and only then did my need for drugs and alcohol come to an immediate halt. I have

since accepted responsibility for my actions, and come to find forgiveness and healing.

10. 30 years later, I answered the call to volunteer at a pregnancy help center. I wanted to be the one who wasn't there for me, to say there is a better way. My baby and I were victims of the abortion industry. But today I am walking in forgiveness and peace and experience the joy of serving in a center where hope is offered to women in crisis pregnancies.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 6th day of September, 2013

HOUSTON, TEXAS

/s/ Madonna Medina

Declaration of Jean Pickett

I **JEAN PICKETT**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I became pregnant after a one night stand when I was 21. I had just graduated from college. I had big plans and a baby was not part of that. So I decided to have an abortion.

3. I went to the newly opened Planned Parenthood in Albuquerque, NM in July of 1973 on what I learned was their first day in business at least doing abortions. There was nobody outside praying or offering alternatives.

4. When I walked in the door they confirmed I was pregnant and said they could take care of it, no problem. I paid my money, got my abortion, and they gave me a bouquet of roses because I was their first client. Despite the fact that I had become pregnant while faithfully taking oral contraceptives they put me back on the same pills. They congratulated me and said to come back and see them.

5. In two years I was there again. Again, I had gotten pregnant on the pill. Again, they provided me with no counseling and no other options. I didn't get roses the second time around.

6. I did not see pro-life counselors outside of the clinic either time. If I had seen someone protesting in a Grim Reaper costume, I would have thought they

should be locked up. That type of protesting is counterproductive and would have only made me become more firmly pro-choice. But what might have brought me around would have been someone out there praying for me and telling me that God loves me. I can't exactly say what I would have done in that case – I might have just brushed them aside – but it also might have brought me back to God sooner so that I wouldn't have had an abortion. It certainly would have had a very different effect than someone trying to frighten me or shout me down.

7. My abortions did serious damage to my mental and physical health. They took a toll on my friendships and romantic relationships, and caused emotional instability, anger, and addiction. Even still, it took years to realize that the abortion was the genesis of my problems. Without the forgiveness that comes from my faith, I would have experienced guilt for a lifetime.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 12th day of August, 2013

AUSTIN, TEXAS

/s/ Jean Pickett

Declaration of Esther Ripplinger

I **ESTHER RIPPLINGER**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had an abortion because I did not receive life-affirming information when I asked for it. At the time I was 19. I was pregnant and scared. My boyfriend and his family told me to get an abortion. I feared the alternative, which was to be a mother all alone. At the clinic, I hoped they would give compassionate advice. I told her we had plans on paper to be married, but his parents insisted on the abortion. "These kinds of relationships don't work out at your age", she said discouragingly. I was not made aware of the many community services available for pregnant women. Rather, she proceeded to sell me the abortion as a "quick-and-painless, routine procedure."

3. I asked the woman about the baby's stage of development. "It's only a blob of tissue", she said. The truth is that my baby already had hands, feet and a beating heart. She proceeded to explain the procedure. She showed me a model to demonstrate the "laminaria", which was to be inserted. "Beyond this point", she emphasized, "You must not change your mind." As I was leaving the room to go to the waiting area, I remembered they had given me a pregnancy test, but she had not told me the result, and so I asked her about the result of the pregnancy test. She said in reply, " It is positive". Upon entry of the waiting room, they gave me Valium. I wished for a way

out even then, but the medicine caused me to not worry about anything. After the "laminaria" procedure, I thought it was too late to change my mind, because of what she had told me.

4. While on the table, a man entered. Though he would perform the abortion, I had not seen him or spoken to him before that moment. Both the sound of the machine and the pain were shocking to me. I was not informed of this excruciating pain. In fact, the woman told me I would feel "minor discomfort" and that "most girls just feel a pinch," gesturing on her arm. But there I was, gripping for my life, feeling the sting of death in the most tender part of my body as my baby was sucked out of me with a vacuum device.

5. For a brief moment, I recuperated on a cot. They needed a place to rest another girl. Even though hardly ready to leave, a woman came to show me out the back fire door. Gingerly, I walked out. This was not the door I entered into the waiting room. Surely someone coming in the front door would be disturbed if they saw how I looked afterwards.

6. I lived in denial for many years, and did not realize to what extent the abortion had affected me. I experienced periods of depression, especially during a certain part of the year, for which I was prescribed an anti-depressant. Years later, I realized my depression was the anniversary of the abortion. The truth is my body had not forgotten this trauma, though I had tried to forget it.

7. I experienced extreme anxiety over the vacuum cleaner, which I later realized was because it reminded me of the suction from the abortion. I also became overly protective of my young son and feared he might die.

8. If someone had given me information and alternatives as I walked into the clinic, I would not have made this choice. Instead, my only memory is of people with pictures of dead babies shouting, which I perceived as not loving and caring for my needs.

9. I have lived with the consequences of my "choice". I have found it to be the worst decision I have ever made. The pain and incredible loss of a child lasts a lifetime. I support petitioners in this case because I want other women to have access to the information that I did not have.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 10th day of September, 2013

AUMSVILLE, OREGON

/s/ Esther Ripplinger

Declaration of Heather Shearfield

I **HEATHER SHEARFIELD**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I was 17 when I had my first abortion. I was terrified. My parents made the decision and I was tremendously relieved when they told me what they had decided. I didn't want anyone at school to know. I believe they made this decision because I was a decent student who would attend college, and a child would interfere with those plans even if I gave it up for adoption. Oh, how they struggled with this decision. I will never forget my mother's statement that she hoped I did not one day regret this decision. I am so sorry that they now have to carry guilt for my poor choices.

3. My mom took me to the clinic. I don't remember much except that a lady assured me that this was "tissue" and not a life or even a child. I was much relieved but didn't need all that much reassuring – I was terrified of having a baby, for many reasons. I was also terrified that this was a child and that my decision was wrong, but I never heard anything to the contrary. So, I proceeded to make the mistake that would change the rest of my life.

4. I believe the actual procedure was traumatic because I do not remember anything about it except that at the end, in the recovery room I was sobbing, crying for my mother and a nurse came over and

gruffly said, "What do you want your mother for? She wasn't with you when you got pregnant."

5. My heart felt like it fell through the floor. I was so very sad. I couldn't quite place what had happened or what I had done but I knew my heart was broken and I just wanted to be held by anyone, it didn't matter. But the only human being nearby had just taken what was left of my heart and stomped it. But, once the nurse said that, I stopped crying, and hardened my heart as best I could. From that moment on I became the hardest, meanest individual I could be, in an attempt to stop the hurting and grieving.

6. I had drank and used drugs prior to this, however now I meant business. I pursued intoxication with a desperation that I didn't recognize in myself. And this lasted for the next 24 years.

7. To top it off, three years after my first abortion I had another, this time on my own volition. It didn't seem like that big of a deal at the time because it's how I handled my first pregnancy. I used birth control but living the lifestyle I did I was not very consistent.

8. I ran hard for about the next ten years. But I couldn't run from the truth any more, and one spring morning I fell to my knees in despair, begging for forgiveness from whatever God there was and the children I aborted. I decided to never again consider abortion, no matter how dire my circumstances.

9. I continued attempting to blot out the reality of what I had done by any means necessary for the next

17 years. I had absolutely no value for my own life. I was a murderer. I am lucky to have survived those years. The desperation, depravity, remorse, regret and shame I lived through I cannot even begin to describe. I still grieve my unborn baby.

10. During this time I had an ectopic pregnancy, and my doctor said he could not save the child, even though I was desperate not to abort another child. He also told me that he had to remove my left fallopian tube, and that I would most likely not conceive children due to the scar tissue. I took this as my just due and punishment for my sins.

11. Remarkably, however, at 37 years old I found out I was pregnant! When they told me at the doctor's office I didn't believe them and didn't even tell my boyfriend when he called to check on me. I just knew it was a mistake. But they did a vaginal ultrasound (my first ever) and it was not a mass, not an ectopic pregnancy, but a baby!

12. Here I was an alcoholic, homeless, unmarried pregnant woman, scared but thrilled! I knew I would not make the same choice again regardless of how hopeless my situation seemed at the time. I am now a sober, productive member of society, employed full time, and an active member of my local church. Best of all I am the mother of a beautiful, smart and loving little girl and married to her father. I know one day, I will have to tell my daughter about her two siblings, but I also know that I have repented and I am forgiven. The facts of my life speak for themselves. When I

attempted to control my own destiny by "choice" I ended up with a life of no choice. When I chose life, I ended up with a life far beyond what I have ever imagined or deserved.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 6th day of September, 2013

LAKE JACKSON, TX

/s/ Heather Shearfield

Declaration of Patti Smith

I **PATTI SMITH**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I have had two abortions, one in the mid 70's and one in the early 80's. I had my first abortion because my career was on the rise, and I did not know who the father was. I actually did not want to have my second abortion, but my parents convinced me it would ruin my life and my career.

3. I remember both abortions like they happened yesterday. The clinic was cold and sterile; there was no one there to provide any type of comfort or assurance. They treated the abortions like something as routine as a dental filling. The sound of the vacuum echoes through my ears and the tugging felt like something was trying with all its might to hold on. Each time I left the clinic, instead of feeling relief I felt empty, like I had left something behind.

4. After my first abortion, I became increasingly promiscuous, drank more, and was hell-bent on self-destruction. I lost the love and respect of my family and the love and respect of myself. I also punished myself for the abortions, by having a tubal ligation and thus surgically removing my ability to have a child. Fifteen years ago, my perceived depravity made me incapable of looking myself in the mirror, so I believed suicide was the only alternative. I was admitted to a psychiatric hospital and eventually underwent rehab.

5. In 2006, I attended a healing retreat and realized that my abortions were the source of many of my problems. I had buried guilt, shame, and self-hatred over my abortions, and turned to drinking and promiscuity to keep it hidden, in a futile quest for love and acceptance. There were no sidewalk counselors outside the clinics for either of my abortions. If there had been people there screaming and holding pictures of aborted babies, I would have walked right by them. If you yell, scream, and holler, that's not going to do anything. I'm convinced that is what the pro-abortion movement wants pro-lifers to do.

6. But if there was someone showing me love and compassion, I think I would have taken a different path. I wish someone had simply said, "Can I talk to you for a minute before you go in, because maybe there are options you haven't considered." None of my friends was trying to dissuade me, and the abortion clinic didn't give me other options. I felt that I had no choice.

7. I still cry about it, and it has been thirty years. I want other women to be able to hear about their own options so they do not make the same choice I did.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 10th day of August, 2013

VISTA, CALIFORNIA

/s/ Patti Smith

App. 33

Declaration of Susan Swander

I, **SUSAN SWANDER**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I had three abortions, the first in 1968 and the last one in 1991.

3. My first abortion was in 1968 when I was only 18, after a one-night stand with someone I had just met, and would never see again. I crossed the border into Juarez, Mexico for the abortion, and I did not question my abortion at the time. I never told my parents because I did not want them to know about my promiscuous lifestyle. No one at the clinic explained the abortion to me, although they were very kind.

4. My second two pregnancies occurred during an affair with a married man, who pressured me into an abortion by threatening to leave me if I kept my child. I could not afford to leave him, either financially or emotionally. Excessive drinking had clouded my thinking, and I still had no real information about abortions – pregnancies were, in my view at the time, simply a problem to be fixed.

5. My second abortion was in California, at an abortion clinic with no pro-life counselors outside. No clinic employee ever mentioned alternatives to abortion to me, or any relevant medical details about the abortion, such as the physical and emotional risks to my health. I was just a body with – as one clinic employee put it – cells that they would remove.

6. My third abortion took place at a hospital in Oregon, near a maternity ward. As before, no one was outside the hospital with pro-life information, and hospital employees did not inform me about the medical procedure, the risks, or abortion alternatives. They just handed me a "consent" form, and joked that I probably did not need to read all the legal lingo.

7. After both of these abortions, the clinic personnel wanted me out of the building as soon as possible. No one asked how I was feeling, or if I needed any counseling or follow-up assistance. I drowned out my physical pain after each abortion with alcohol.

8. Nothing in my life has ever been "well" or the same since 1968. I suffered for 36 years from depression, guilt, shame, alcoholic drinking, drug use, promiscuity, overeating, and deep-seated anger. In 2004, I finally found a path of healing and tools of recovery through Rachel's Vineyard Ministries. I am not "fixed" or "cured," but I am much healthier than I have ever been since that fateful day in 1968.

9. I wish there had been someone to tell me about my options before I had my abortions. Someone outside a clinic with a bullhorn would have made me angry – if I had heard someone screaming at me during my crisis, I would have probably yelled right back. A message about abortion alternatives could have resonated with me, but I needed someone to talk to me in a calm tone of voice, or a gentle touching of my elbow to ask if they could talk to me.

10. If someone had given me correct information about my babies, post abortion trauma, and abortion alternatives, I truly believe I might have made different choices – my 3 children might be alive today. I needed to know that I had a way out other than abortions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 10th day of September, 2013

WALDPORT, OREGON

/s/ Susan Swander

Declaration of Molly White

I **MOLLY WHITE**, declare based on personal knowledge as follows:

1. I am over the age of 18 and competent to testify.

2. I declare under penalty of perjury that the foregoing is true and correct.

3. I had two abortions in Texas, one in 1981, and one in 1985.

4. Before my first abortion, I went to a local medical clinic for a pregnancy test. I had never visited that clinic before and did not know the doctor prior to my visit. The doctor came into the examining room and told me that my pregnancy test was positive. He then said, "You don't look too happy about this, but don't worry about a thing. You can have an abortion. Don't worry about a thing. You are not very far along and there is nothing to it." He gave me a name and number to an abortion clinic in nearby Austin.

5. Since I was young and naïve, I put a lot of trust in those who I thought were more knowledgeable than myself and I pursued that option. My heart and mind battled on the way to the clinic the next day. I did want information so when I arrived at the clinic I asked about the fetal development of my baby (6-8 weeks) and was told it was just a tiny blob of tissue. I then asked about the abortion procedure and was told it was a minor, safe procedure that would "clean me out" and that it had the same discomfort level as a menstrual cycle. Both of these questions were

answered with lies and misinformation and I based a life taking, life altering decision on the lack of factual information.

6. My abortions caused me continual bleeding, a damaged cervix, and uterine scarring, which gave me two stillborn children and a miscarriage.

7. I did not have any information about fetal development or abortion procedures and the risks of abortion. Neither did I have any information about abortion alternatives or crisis pregnancy centers where I could go for information and help. If I would have had this information I would have made a more informed decision and would not have chosen abortion.

8. I believe my children would be alive today if there had been sidewalk counselors in front of the clinics where I went to have an abortion. If someone had been outside of the clinic offering me help and information, talking face-to-face with me, I would have decided against having the abortion, which was the most regrettable decision of my life.

9. I would have definitely changed my mind concerning abortion if a sidewalk counselor had been available to talk to me and give me the information I was seeking, and give me the hope and encouragement I needed.

10. With a sidewalk counselor being so far away and the parking for the facility so secluded I would have

never have been able to get that information with a buffer zone like the one in Massachusetts.

11. Not being able to talk to a person up close and in a personal way would have been a hindrance in getting the encouragement and help that I needed.

12. Everyone has the right to information, including a woman seeking an abortion. Every woman has a right to change her mind. Even if she is going to an abortion clinic, she has the right to change her mind. She may be seeking counsel there, but the counsel she gets from them will be to get an abortion.

13. If people approach you in a parking lot selling things or asking for donations they can give you information, and you can take it or not take it – it's your choice. The same rights should apply for sidewalk counseling. Sidewalk counselors aren't there seeking money, they are providing help and resources for pregnant women in need.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 11th day of September, 2013

BELTON, TEXAS

/s/ Molly White

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *ET AL.*,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE VICTIM RIGHTS LAW CENTER, RENEE DEVESTY, *ET AL.* IN SUPPORT OF RESPONDENTS

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U.S. Food and Drug Admin., Press Release, *FDA Approves ella Tablets for Prescription Emergency Contraception*, www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm 7, 9

Victim Rights Law Center, Inc., *Beyond the Criminal Justice System: Using the Law to Help Restore the Lives of Sexual Assault Victims* (2d ed. 2012) 14

STATEMENT OF INTEREST[1]

The Victim Rights Law Center ("VRLC") is a non-profit organization dedicated to promoting a national movement seeking justice for every rape and sexual assault victim. To this end, every year VRLC provides free legal services to more than 400 adult and youth victims of rape and sexual assault in Massachusetts and Oregon. VRLC also provides training, consulting, mentoring and legal resources to thousands of legal professionals across the United States on the use of civil laws to protect and promote the rights of sexual assault survivors. VRLC was the first non-profit agency in the United States dedicated to meeting the legal needs of sexual assault survivors.

Renee DeVesty is a rape survivor. She has spoken out about her personal experience of rape and pregnancy from rape with the mission of empowering and inspiring survivors.

Amici also include thirty-eight other organizations, which are set forth in the appendix to this brief, that are committed to ending sexual violence in the United States and that provide a wide variety of services to victims of rape and other forms of sexual violence. These *amici* advocate on behalf of the interests of sexual assault survivors, promote awareness of sexual assault, and otherwise serve individuals, families, and communities that have been impacted by sexual violence.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk.

Amici have a particular interest in the outcome of this case because they understand the importance of ensuring that sexual assault victims have safe access to health care services, including reproductive health care services, in the aftermath of an assault. Based on their extensive experience advocating on behalf of victims of rape and sexual assault, *amici* know that privacy and safety are two of the primary needs of sexual assault survivors, both of which will be at risk if the Massachusetts buffer zone law is not upheld.

SUMMARY OF ARGUMENT

The buffer zone around reproductive health care facilities that Massachusetts has established is critical to protect an already traumatized and particularly vulnerable group of patients—victims of rape.

Every day, nearly 3,500 adult women in this country are raped—1.27 million each year. About one in five adult women has been a victim of rape at some point in her life. Many victims have been raped multiple times. The epidemic of rape results in more than 32,000 pregnancies each year. As startling as these estimates are, they significantly understate the problem, because they exclude the 44% of all rapes that involve girls below the age of 18.

Rape victims are among the people Massachusetts is protecting by adopting a fixed 35-foot buffer zone law that limits "entering" and "remaining" in areas that immediately surround the driveway and entrance to reproductive health care facilities. *See* Mass. G.L. c. 266, § 120E½. This protection is vital to the mental and physical health of these victims, who in the days following their assault have an urgent need for the care that the facilities offer but who are often

vulnerable and traumatized as a result of the violence they have suffered.

Victims of rape have particularly acute needs for both pregnancy- and non-pregnancy-related services including, for example, diagnosis and treatment of sexually transmitted infections. Out of concern for privacy, embarrassment, lack of money, or intense need for anonymity, victims often do not seek medical attention from their customary doctors, and instead visit reproductive health care facilities. Reproductive health care facilities thus provide critical services to rape victims and often are the best and most readily accessible place to get help.

At the same time, victims of rape are exceptionally vulnerable patients because they have suffered an extreme trauma. The severe psychological and emotional consequences of rape are obvious and well-recognized. Rape victims often feel shame and fear, suffer from post-traumatic stress disorder, panic attacks, flashbacks, and depression, and are at an increased risk of suicide. Emotional, physical and behavioral symptoms may be especially intense in minors. Collectively, these factors underscore the victims' need for the utmost privacy, physical integrity, and a sense of security regarding physical space, especially in the period immediately following an assault. Indeed, numerous other laws that the Massachusetts Legislature has enacted to protect rape victims demonstrate this well-founded concern for their unique needs.

The Massachusetts Legislature enacted this buffer zone law in response to an unfortunate history of harassment, blockading, and intimidation of individuals attempting to access reproductive health care facilities. Those precise types of intrusion pose

the greatest threat to girls and women who recently have been raped, whose trauma from sexual assault is raw and whose emotional balance is fragile. But whether those outside the clinics are hostile or respectful, loud or subdued, intimidating or pleasant, their physical proximity to the victims and the unwanted public exposure they inflict strike at the core of the victim's need for privacy, physical integrity, and personal security. Without a buffer zone, many rape victims either would not go to the clinics, thus forgoing needed medical care, or would run the gauntlet of protestors and risk worsening the traumatic injury they have suffered.

States have a significant interest in protecting access to reproductive health care facilities for all patients. That interest is at its apex with regard to victims of rape, where state government may quite properly seek to ensure that victims have a clear path to reach such facilities unimpeded and without further jeopardizing their physical, psychological, and emotional health. The alternative laws that Petitioners cite as sufficient, which predate the buffer zone, criminalize only *intentional* obstruction, harassment, intimidation, and the like. The harm to rape victims, however, can occur without regard to the intent of those protesting outside the facilities. By blocking a clear path to the door, those protesters' actions inherently interfere with rape victims' access.

The Massachusetts buffer zone law prevents the harm caused by the constructive blocking of facility entrances—*i.e.*, the blocking caused by the mere presence of people in close proximity to facility entrances, whatever their intent. It keeps a small area around facility entrances clear, thereby ensuring that all patients can enter without fighting through a

crowd of protestors directly in front of the door (a prospect that could be especially distressing for women and girls recently traumatized by rape). The restriction covers only that small area, allowing protestors to engage in all forms of lawful speech outside of the zone. As such, the buffer zone law is narrowly tailored to serve the government's significant interests in ensuring that patients have unimpeded access to reproductive health care facilities, and to protect the most vulnerable of those patients, rape victims.

ARGUMENT

I. REPRODUCTIVE HEALTH CARE FACILITIES PROVIDE ESSENTIAL SERVICES TO RAPE VICTIMS

A. Rape Is Rampant in the United States and Commonly Results in Pregnancy- and Non-Pregnancy-Related Health Complications

Rape has regrettably reached epidemic proportions in the United States.[2] The Centers for Disease Control and Prevention ("CDC") estimate that nearly one in five adult women in the United States has been raped

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[2] Rape encompasses "any completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent." National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, at 17 (August 2011) [hereinafter "CDC Report"].

at least once.[3] The CDC further estimates that 1.27 million adult women in the United States are raped each year.[4] This estimate, however, dramatically understates the number of victims, as it does not include minors (*i.e.*, those under the age of 18), who account for approximately 44% of all rape victims.[5]

Even apart from this omission, the CDC cautions that its figures likely underestimate the prevalence of rape because of limitations in the survey methodology, the nature of the crime, and the reluctance of many victims to disclose an assault.[6] With or without some adjustment for these limitations, the numbers are staggering. Rape impacts many millions of people in the United States every year, particularly adolescent and young adult women.

The more than 1.27 million rapes each year cause serious pregnancy- and non-pregnancy-related health issues for female victims. Researchers estimate that

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[3] CDC Report, *supra* note 2, at 18. It is important to recognize that sexual violence impacts everyone, including males. The CDC estimates that one in 71 adult men in the United States has been raped at least once in his lifetime. *Id.* at 19. Men and boys who have been raped also obtain services at reproductive health care facilities, such as testing for and treatment of sexually transmitted infections. Because patients of reproductive health care facilities are predominantly girls and women, this brief focuses on the protection the Massachusetts buffer zone provides for girls and women who have recently been raped and urgently need access to reproductive health care facilities.

[4] *Id.* at 18.

[5] U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, at 3 (Feb. 1997), http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf (last visited Nov. 13, 2013).

[6] CDC Report, *supra* note 2, at 85.

rape results in approximately 32,000 pregnancies each year.[7] Rape also can result in sexually transmitted infections ("STIs"). It is difficult to estimate the number of rape-related STIs,[8] but regardless of the rate of infection, many rape victims understandably fear that they have contracted an STI as a result of the assault. They appropriately seek medical attention post-assault, in many cases at affordable and accessible reproductive health care facilities.

B. Rape Victims Need Help at Reproductive Health Care Facilities

Reproductive health care facilities, such as Planned Parenthood, provide numerous pregnancy- and non-pregnancy related services that are critical for those who have recently been raped. Health authorities recommend that many of these services, including emergency contraception and STI prophylactics, be obtained within three to five days of a sexual assault.[9] It is vital that rape victims have ready access to reproductive health care facilities within days after their trauma.

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[7] Melisa M. Holmes, *et al.*, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 American Journal of Obstetrics and Gynecology 320, 320 (1996).

[8] Melisa Holmes, *Sexually Transmitted Infections in Female Rape Victims*, 13 AIDS Patient Care and STDs 703, 703-04 (1999).

[9] *See, e.g.*, Centers for Disease Control and Prevention, *Sexually Transmitted Diseases Treatment Guidelines*, 2010, 59 Morbidity and Mortality Weekly Report, at 91-93 (Dec. 17, 2010); U.S. Food and Drug Admin., Press Release, *FDA Approves ella Tablets for Prescription Emergency Contraception*, www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm (last visited Nov. 15, 2013).

1. Non-Pregnancy-Related Services. Reproductive health care facilities provide many services unrelated to pregnancy. Most notably, reproductive health care facilities provide anonymous STI testing and treatment, which should be initiated within 72 hours after the rape.[10] Access to quick, anonymous, and affordable STI testing is critical to both the mental and physical health of these individuals. In addition, staff at reproductive health care facilities typically are trained to identify adults and minors who might have been raped. This information is used to guide patient care, and most reproductive health care facilities, including all Planned Parenthood centers, provide referrals for forensic medical examinations following a suspected rape.

2. Pregnancy-Related Services. Of course, women and girls also fear pregnancy after rape, and for many victims the concept of carrying and bearing the rapist's child is intolerable.[11] Health authorities recommend that *all* women of childbearing age be tested for

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[10] For example, the CDC recommends a prophylactic regimen for victims of sexual assault designed to prevent contraction of hepatitis B, chlamydia, gonorrhea, trichomonas, and, in some cases, human immunodeficiency virus ("HIV"), that should be initiated within 72 hours after the sexual assault. *See* CDC, *Sexually Transmitted Diseases Treatment Guidelines*, *supra* note 9, at 91-93.

[11] *See, e.g.*, *Blog Carnival: My Planned Parenthood Is a Mental Health Hookup*, http://anytimeyoga.wordpress.com/2011/07/06/blog-carnival-my-planned-parenthood-is-a-mental-health-hookup/ (last visited Nov. 4, 2013) ("I know it's ridiculous, but I can't shake it. Because if the tests are wrong, I am pregnant with the genetic progeny of my rapist. And my psyche cannot handle that.").

pregnancy following a rape.[12] Reproductive health care facilities provide a number of services to assist these women in understanding and managing their pregnancy. These services include, for example, counseling, pregnancy testing, emergency contraception (which has to be administered within three to five days post-assault, depending on the type of contraception[13]), genetic testing information, and abortion.

* * * *

Out of embarrassment or a clinically intense need for privacy and anonymity, many rape victims do not turn to their customary doctors. Reproductive health care facilities are often the best, most affordable[14] and most readily accessible health care resource in many communities to help rape victims. An anonymous letter to Planned Parenthood demonstrates the enormous value reproductive health care facilities provide to those who have just been raped:

> Thank you for being there after I was raped. Thank you for being calm, warm, and professional when I was emotionally fragile and alone in a city where I had no one I could trust. Thank you for

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[12] *See* U.S. Dep't of Justice, Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations*, at 115 (2d ed., Apr. 2013), www.ncjrs.gov/pdffiles1/ovw/241903.pdf (last visited Nov. 19, 2013).

[13] *See, e.g.*, U.S. FDA, *supra* note 9.

[14] Statistics show that poor women are more likely to be raped. *See, e.g.*, Michael Planty, *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010*, at 3 (March 2013) (females with household income less than $25,000 are almost twice as likely to be a victim of sexual assault).

providing morning-after birth control so that I did not have to bear my rapist's child. Thank you for anonymous STD testing that I could afford. Thank you for making me feel safe at a time when I thought I could never feel safe again.[15]

II. RAPE VICTIMS HAVE A PARTICULARLY STRONG PRIVACY INTEREST IN AVOIDING CLOSE PHYSICAL PROXIMITY TO STRANGERS WHEN ACCESSING REPRODUCTIVE HEALTH CARE FACILITIES

Researchers and victim service providers have documented the many physical and psychological impacts of rape. For many rape victims, privacy, physical integrity, and a sense of security regarding physical space are paramount. As a result, the absence of a buffer zone at reproductive health care facilities to limit protestors from confronting patients at close range—often within a mere *three days* of the assault—would deter many victims from accessing necessary medical care. If rape victims were forced to encounter protestors without a clear path to the entrance, the experience would potentially aggravate the psychological harm they have suffered.

A. Victims of Rape Frequently Experience Psychological Trauma That Makes Unwanted Contact and Close Confrontations Especially Difficult and Distressing

Rape is manifestly among the most severe traumas that an individual can experience. The psychological impacts of rape have been extensively researched and

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[15] http://dearplannedparenthood.tumblr.com/ (last visited Nov. 13, 2013).

are well characterized in the medical literature.[16] In 1974, researchers first described the symptoms—emotional, physical, and behavioral—that rape victims experience.[17] These symptoms include humiliation and embarrassment; self-blame and lowered self-esteem; depression; paralyzing anxiety and panic; fear of crowds and strangers; hyper-vigilance; and flashbacks.[18] Victims of rape also are at increased risk of developing psychiatric disorders, including post-traumatic stress disorder and major depression, and of committing suicide.[19] Researchers estimate that 33% of rape victims have contemplated suicide and 13% have attempted it (versus 8% and 1% for non-victims).[20]

It is difficult to convey with statistics and diagnostic terminology the intensity and severity of psychological harm that rape inflicts. Personal accounts of victims

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[16] *See, e.g.*, Mary P. Koss, *et al.*, *Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery*, 27 Psychology of Women Quarterly 130, 133 (2003).

[17] *See* Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 American Journal of Psychiatry 981, (1974).

[18] *See, e.g.*, Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature*, 29 Clinical Psychology Review 431, 432 (July 2009); Koss *et al.*, *supra* note 16, at 133; Burgess *et al.*, *supra* note 17, at 983.

[19] *See, e.g.*, Koss *et al.*, *supra* note 16, at 133; Barbara Olasov Rothbaum, *et al.*, *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 Journal of Traumatic Stress 455 (1992).

[20] *See* Dean G. Kilpatrick *et al.*, National Victim Center and Medical University of South Carolina, *Rape in America: A Report to the Nation*, at 7 (Apr. 23, 1992).

can provide some insight into how these clinical symptoms affect the victims' lives and how important unimpeded access to medical and counseling services can be. The story of one such victim, *amicus* Renee DeVesty, paints a vivid picture of these clinical symptoms, and of the importance of unimpeded access to a range of medical and counseling services:

> After that night, my mind turned against me. Poisonous thoughts seeped into every crevice and I had nightmares of faceless strangers chasing me every night in my dreams. I did not trust anyone. I blamed myself. I believed that I would never be able to cleanse the filth off my body. I never pressed charges, because at 19 years old (and this was 30 years ago), I wasn't even sure if this was legally a crime, since I knew the men who raped me.
>
> But just when I thought the horror couldn't escalate any further, things got worse: My period never came. At first, I assumed it was due to the stress and anxiety, so I waited. I waited and waited, and fear swarmed in my mind.
>
> Eight weeks after I was raped, Planned Parenthood gave me the confirmation: I was pregnant. The woman who worked there tried to tell me about my options, but I ran. I threw up in the parking lot. I drove around for hours praying this was all a dream.
>
> . . .
>
> I was mentally, emotionally and spiritually broken, and the thought of what had resulted from this vile act took my self-hatred into another dimension. I wanted no memory of that night, would do anything possible to erase it in the hope

> that it would somehow ease the sick, disgusting feeling I got every time I looked in the mirror. I realized that in order to maintain what little sanity I had left, I had to terminate the pregnancy.
>
> Six months after the rape, I dropped out of college and developed an eating disorder. I collapsed into alcohol abuse and had abusive relationships. It took me 12 years of trying to kill myself before I could actually verbalize to a trusted counselor what happened to me. I spent the next eight years trying to reverse the damage that was done.
>
> Twenty years of serving time for a crime I didn't commit.[21]

As this account reflects, the trauma of rape, especially when it causes pregnancy, cannot be overstated. The Massachusetts fixed 35-foot buffer zone addresses two manifestations of this trauma—the need for privacy and the need for safe, unimpeded access to reproductive health care facilities.

1. The Need for Privacy. While every rape victim is unique, victims of rape consistently report feeling humiliated and embarrassed about their assault.[22] Victims often do not report rape to legal authorities[23]

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[21] Renee DeVesty, *I Got Pregnant From Rape*, Salon.com, available at www.salon.com/2012/08/22/i_got_pregnant_from_rape/ (last visited Nov. 11, 2013). Ms. DeVesty joins the *amici* in this brief and has confirmed that she supports quoting her article in this brief.

[22] See Kilpatrick *et al.*, *supra* note 20, at 9; Burgess *et al.*, *supra* note 17, at 983.

[23] *See* Planty *et al.*, *supra* note 14, at 7 (finding that 64% of female rape and sexual assault victims did not report rape or sexual assault to the police).

or even to their own families.[24] Many rape victims do not disclose the rape because they are ashamed, because they are concerned that their credibility will be questioned, or because they fear they will be blamed for what happened to them.[25] These feelings, however unfortunate, are real. Rape is extraordinarily invasive, robbing victims of their dignity, bodily integrity, and personal autonomy.[26] The stigma often associated with an assault compounds these harms. It is not surprising, then, that victims of rape commonly express a consuming need for privacy.[27]

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[24] *See* Kilpatrick *et al.*, *supra* note 20, at 9 (finding that rape victims reported concerns about their family knowing that they have been sexually assaulted).

[25] *See* CDC Report, *supra* note 2, at 4 ("Survivors may be reluctant to disclose their victimization for a variety of reasons including shame, embarrassment, fear of retribution from perpetrators, or a belief that they may not receive support from law enforcement. Laws may also not be enforced adequately or consistently and perpetrators may become more dangerous after their victims report these crimes."); Koss *et al.*, *supra* note 16, at 137 ("A second obstacle to reaching out for help is that survivors of male violence fear their credibility will be questioned or they will be partly blamed for what happened to them. For example, most rape survivors who had contacted legal or medical services had two or more experiences that left them feeling revictimized.").

[26] *See, e.g.*, Victim Rights Law Center, Inc., *Beyond the Criminal Justice System: Using the Law to Help Restore the Lives of Sexual Assault Victims*, at 48 (2d ed. 2012) ("A sexual assault victim's fear of others finding out about the assault is a natural part of the trauma reaction; sexual violation is humiliating, degrading, and undermines a victim's sense of autonomy and dignity.").

[27] *See, e.g.*, Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. Tex. L. Rev. 695, 713 (2007) ("The first need of rape victims, both personal and legal, is privacy."); Oriana

The Massachusetts Legislature, like other legislative bodies across the United States, recognized the obvious: victims of rape have a unique need for privacy against unwanted public attention, inquisition, and approach. Accordingly, Massachusetts has enacted numerous safeguards to protect the privacy of victims of rape and sexual assault, including: (i) a prohibition on publishing the names of rape victims in the media, Mass. G.L. c. 265, § 24(c); (ii) evidentiary limitations regarding cross-examination of rape victims regarding the victims' sexual history (*i.e.*, rape shield laws), Mass. G.L. c. 233, § 21B[28], (iii) a Victim Bill of Rights requiring separate and secure waiting areas in courthouses for victims, Mass. G.L. c. 258B, § 3(i); (iv) recognition of the privileged nature of communications between victims and sexual assault advocates, Mass. G.L. c. 233, § 20J, and (v) a

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Mazza, *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 St. John's L. Rev. 763, 776 (2008) ("It was not long ago that rape victims were practically treated as criminals by society and there still remain some similar negative attitudes today. . . . In making the rape victim feel comfortable about bringing [criminal] charges, the right to privacy is paramount.").

[28] Almost every state has adopted some form of rape shield law. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-86f (West 2010) (evidence of the sexual conduct of the victim is inadmissible); Ga. Code Ann. § 24-2-3 (West 2010) (evidence relating to the past sexual behavior of the complaining witness is inadmissible); 725 Ill. Comp. Stat. Ann. 5/115-7 (West 2010) (prior sexual activity and the reputation of the alleged victim are inadmissible); Mich. Comp. Laws Ann. § 750.520 (West 2010) (opinion and reputation evidence of the victim's sexual conduct and evidence of specific instances of the victim's sexual conduct are inadmissible); Utah Code Ann. § 412 (West 2010) (evidence offered to prove that victim engaged in other sexual activities or to prove a victim's sexual predisposition is inadmissible).

prohibition on the disclosure of the names of rape victims or any other identifying information by medical providers to criminal authorities, Mass. G.L. c. 112, § 12A½.

2. The Need for Physical Distance. Many rape victims also report fear of crowds, strangers, and physical contact and proximity.[29] Research describes rape victims as "quite apprehensive when they had to be in crowds" and "fearful of people walking behind them."[30] One victim reported: "I can't stand to have someone behind me. When I feel someone is behind me, my heart starts pounding. Last week I turned on a guy that was walking in back of me and waited till he walked by. I just couldn't stand it."[31]

In part, rape victims' need for physical space results from a desire to avoid situations and stimuli that remind them of the rape itself. As one victim rights organization summarizes: "Rape victims may experience uncontrollable intrusive thoughts about the rape, essentially unable to stop remembering the incident. . . . [V]ictims may relive the event through flashbacks, during which victims experience the traumatic event as if it was happening now. Additionally, victims are distressed by any event that symbolizes the trauma of rape. Victims avoid talking about the event and will avoid any stimuli or situations which remind them of the rape."[32]

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[29] *See* Burgess *et al.*, *supra* note 17, at 984; Vickerman *et al.*, *supra* note 18, at 432 (collecting studies).

[30] Burgess *et al.*, *supra* note 17, at 984.

[31] *Id.*

[32] New York City Alliance Against Sexual Assault, Factsheet, *Rape-Related Posttraumatic Stress Disorder*, www.svfreenyc.org/survivors_ factsheet_43.html (last visited Nov. 13, 2013).

The Massachusetts buffer zone law is designed to create the physical space that rape victims so desperately need when they seek to enter a reproductive health care facility. It keeps a small area around facility entrances free and clear, thereby ensuring that patients can access the facility without having to fight through a crowd of protestors to do so. This protection is important for all patients, but is especially critical for girls and women who have recently been raped, who likely are terrified of crowds and strangers, and who are more likely than most not to enter the facility rather than encounter a crowd of strangers directly in front of the facility entrance.

B. Many Victims of Rape Are Minors, A Particularly Vulnerable Population

The majority of rape victims are between the ages of twelve and twenty-four, and approximately 44% are under the age of 18.[33] As described above, rape harms nearly all victims psychologically, regardless of age, in ways that make unwanted contact and confrontation particularly distressing. Minors, however, are a particularly vulnerable population and manifest the trauma of rape even more acutely, have an even greater craving for privacy and physical space, and need help even more.[34]

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[33] *See* U.S. Dep't of Justice, *supra* note 5, at 3.

[34] *See, e.g.*, Bob Roehr, *Bullying Doubles, Rape More Than Triples Risk for Teen Suicide* (Nov. 15, 2010), www.medscape.com/viewarticle/732519 (last visited Nov. 13, 2013) (finding that "young women who reported a history of being raped were 3.350 times more likely to have attempted suicide"); Allison E. Croysdale, *et al.*, *Correlates of Victimization in a Juvenile Justice Population*, 17 Journal of Aggression, Maltreatment & Trauma 103 (2008) (finding that adolescent females in juvenile justice facilities who reported having

C. Rape Victims Have A Strong Privacy Interest In Avoiding Unwanted Proximity of Protestors

This Court has repeatedly recognized a privacy interest in avoiding unwanted communication. *See*, e.g., *Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases."); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (recognizing a privacy interest in avoiding unwanted speech in the home and surrounding areas); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."). Accordingly, this Court has held that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, 530 U.S. at 716 (citing *Frisby*, 487 U.S. at 487).

The "privacy interest in avoiding unwanted communication varies widely in different settings," and is particularly strong in the health care context. *Id.* In this respect, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994). Thus, this Court upheld state statutes designed "to protect those who wish to enter health care facilities, many of whom may be under

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experienced sexual abuse were almost twice as likely to have a history of suicide attempts (59% versus 33%)); Dean G. Kilpatrick, *et al.*, *Violence and Risk of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results From the National Survey of Adolescents*, 71 Journal of Consulting and Clinical Psychology 692 (2003).

special physical or emotional stress, from close physical approaches by demonstrators." *Hill*, 530 U.S. at 729. In this setting, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11, n.6 (1975) (citation and brackets omitted).

Especially given that the clinically intense need for privacy is a demonstrated psychological consequence of rape, victims are entitled to be spared unwanted physical and verbal confrontations in seeking to enter reproductive health care facilities. These victims epitomize the vulnerable patient under special physical and emotional stress, as identified in *Hill* and *Madsen*, who should be able to seek medical attention without Herculean efforts to escape people blocking their way or confronting them. *Madsen*, 512 U.S. at 772-73. Renee DeVesty's experience again highlights how harmful such contacts can be. After learning that one of her assailants had impregnated her, she ran out to the parking lot and vomited. It is abhorrent to imagine Ms. DeVesty, or the many other girls and women who find themselves in a similar physical and psychological condition, having to press through a crowd of protestors to enter or exit the facility.

Hill recognized that the strength of one's privacy interest depends on the circumstances. Protecting a rape victim seeking to avoid unwanted confrontation and public attention at a reproductive health care facility, whether in the immediate aftermath of the assault or weeks or months after the assault when the victim is still suffering from the trauma, is particularly compelling. Massachusetts is entitled to honor that privacy interest and afford that protection.

III. THE BUFFER ZONE LAW IS NARROWLY TAILORED TO ADDRESS MASSACHUSETTS' SIGNIFICANT INTERESTS IN PROTECTING THE HEALTH AND SAFETY OF RAPE VICTIMS AND ENSURING THEIR UNIMPEDED ACCESS TO REPRODUCTIVE HEALTH CARE FACILITIES

Massachusetts enacted the fixed 35-foot buffer zone law because preexisting laws did not prevent the crowding of protestors directly outside of the facilities that deters patients in general, and victims of rape in particular, from access. The buffer zone law is narrowly tailored and effective in addressing the state interest in protecting the health and safety of rape victims and ensuring their access to reproductive health care facilities.

A. Massachusetts Has A Strong Interest In Ensuring That Rape Victims Have Unimpeded Access To Reproductive Health Care Facilities

Massachusetts' interest in ensuring that patients have safe, unimpeded access to reproductive health care facilities is especially strong with respect to girls and women who have been raped (often in the immediately preceding few days). As described above, these individuals urgently need access to reproductive health services, but also are the most likely to be traumatized and impeded from accessing such services because of crowding and confrontational protests directly outside of the facilities.

Massachusetts has a strong interest in ensuring that all of its citizens have unimpeded access to reproductive health care facilities. Thus, this Court has held that "ensuring public safety and order,

promoting the free flow of traffic on streets and sidewalks, . . . and protecting a woman's freedom to seek pregnancy-related services" were "certainly significant enough" to justify government action "to secure unimpeded physical access to [reproductive health] clinics." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997); *see also Madsen*, 512 U.S. at 767-68 ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

As particularly relevant to rape victims, however, Massachusetts also has a recognized interest in protecting the health and safety of patients visiting reproductive health care facilities and in encouraging victims to seek medical care post-assault. *See Hill*, 530 U.S. at 729 ("Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions."); *id.* at 737 (Souter, J., concurring) ("No one disputes the substantiality of the government's interest in protecting people already tense or distressed in anticipation of medical attention (whether an abortion or some other procedure) from the unwanted intrusion or close personal importunity by strangers.").[35] The Commonwealth's interest extends beyond physical health to mental and

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[35] *See also Madsen*, 512 U.S. at 772 ("'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . need a restful, uncluttered, relaxing, and helpful atmosphere.'") (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84, n.12 (1979)).

emotional health. *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (holding that the psychotherapist privilege "serves the public interest" because "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance").

Protestors blocking the entrances to reproductive health care facilities and confronting patients who try to enter without any effective limitation not only inhibits access but also can cause real psychological harm. *See, e.g., Madsen*, 512 U.S. at 768 ("[T]argeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance.") (internal citation omitted). Girls and women who have just been raped are particularly likely to suffer psychological trauma from protestors intentionally or unintentionally blocking their access to reproductive health care facilities. Accordingly, Massachusetts' recognized interest in protecting the health and safety of its citizenry, and particularly the health and safety of the subset of its citizenry that has been victimized by rape, "justif[ies] a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Hill*, 530 U.S. at 715 (internal citations omitted).

B. Pre-Existing Laws Are Inadequate Alternatives To Ensure Rape Victims' Safe Access To Reproductive Health Care Facilities

Petitioners contend that existing Massachusetts and federal laws are sufficient to address the decades-long problem of obstruction, harassment, and intimidation outside of reproductive health care facilities in Massachusetts. Pet. Br. at 34-38. This is

incorrect as a general matter, and palpably wrong with respect to rape victims. Put simply, even with the suggested alternatives, protestors may still crowd in front of the facility entrances. That means patients, including rape victims, are forced to push through the crowd without a clear path to the entrance of the facility. In many cases, a rape victim may choose to forego such critical and urgent services altogether rather than run the gauntlet of protestors. As a result, without the 35-foot buffer zone law, the government cannot ensure these victims' safe access to important health services.

The legislative record for the buffer zone law demonstrates that pre-existing laws simply have not worked to ensure safe and unimpeded access to reproductive health care facilities in Massachusetts, and the difficulties identified are especially severe for rape victims. Prior to enactment of the floating buffer zone law in 2000 (which preceded the current 35-foot fixed buffer zone law), harassment and intimidation outside reproductive health care facilities in Massachusetts were prevalent. The record contains testimony regarding several incidents of close approach and intimidation, each of which underscores why rape victims would find such encounters intolerable:

- At one Massachusetts clinic, three protestors stood across the entrance with less than a foot between them, forcing an individual to squeeze between them to gain access to the facility. J.A. 17.
- The clinic director for a Boston facility testified that a woman had tried to enter the facility garage but was blocked by protestors from accessing the swipe card machine. Two other

protestors moved behind the woman's car and prevented her from backing up. J.A. 16, 20.

- A physician who worked at a Boston facility was confronted every day by protestors who surrounded her car as she tried to enter the garage, put their faces to her window, screamed her first name, called her a murderer, and videotaped her. J.A. 12.

Subjecting rape victims to the types of entrapment, menacing hostility, and in-your-face videotaping described above would be cruel. Massachusetts has a legitimate interest in protecting rape victims from such conduct.

In large part, the pre-existing laws have proven to be inadequate because they target only intentional blockading, harassment, intimidation, and the like. *See, e.g.*, Mass. Gen. Laws c. 266, § 120E½(e) (prohibiting knowingly obstructing, detaining, hindering, impeding, or blocking facility entrances); *id.* § 120E (prohibiting knowing obstruction of entrances to a medical facility); 18 U.S.C. § 248(a)(1) (prohibiting using force, threat of force, or physical obstruction to injure, intimidate, or interfere with any person obtaining or providing reproductive health services). For rape victims, however, it is not only the intentional conduct that is problematic. The massing of individuals in doors, driveways, and entryways can also be upsetting and likely to cause a victim to decline to seek necessary medical assistance at the facility.

The *Hill*-style floating buffer zone law that the Massachusetts Legislature enacted in 2000 failed to ensure safe, unimpeded access to reproductive health care facilities for this same reason. Protestors continued to block access to the entrances of

reproductive health care facilities and to intimidate patients. For example, Boston Police Department Captain William B. Evans testified that protestors "stand up right in front of the door" and "[a] lot of them hold signs right there." J.A. 67, 122. Protestors took up stationary positions a few feet apart, forcing patients to "pass very close to them" on their way to the door. J.A. 96. Captain Evans further described the activity at the facility entrances as so frenetic that it was like "a goalie's crease," and the sheer amount of protestor activity caused many patients to leave the facility rather than fight through the masses of protestors. J.A. 69, 88-89.

Quite apart from any speech, the conduct of these protestors intimidated many patients and deterred them from entering the facility. This type of protestor activity is especially noxious for those dealing with the traumatic effects of rape. The archetypal symptoms experienced by rape victims—the fear of crowds, the revulsion to physical proximity or contact, the intense need for privacy—are precisely the sensitivities that are assaulted when protestors block entrances, swarm cars, and scream at staff and patients from close distances. Whereas this conduct is problem enough for the ordinary patient, it poses a seemingly insurmountable hurdle for a girl or woman who has been raped.

The fixed 35-foot buffer zone law corrects the inadequacy of prior laws by prohibiting people from gathering in close proximity to facility entrances. By keeping a small area around the facility entrances clear, the buffer zone law ensures that patients can access the facility while still allowing protestors to engage in all forms of lawful communication outside of the zone. The buffer zone law is narrowly tailored

to ensure important governmental interests—unimpeded access to reproductive health care facilities for patients in general and rape victims in particular—and should be upheld.

CONCLUSION

For the reasons discussed herein and in the brief for respondents, the Court should affirm the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici Curiae*

Boston Area Rape Crisis Center (BARCC)

California Coalition Against Sexual Assault (CALCASA)

Chicago Alliance Against Sexual Exploitation (CAASE)

Connecticut Sexual Assault Crisis Services (CONNSACS)

Florida Council Against Sexual Violence

Idaho Coalition Against Sexual Assault & Domestic Violence

Illinois Coalition Against Sexual Assault (ICASA)

Iowa Coalition Against Sexual Assault (IowaCASA)

Jane Doe Inc. (JDI)

Legal Momentum

Legal Voice (formerly the Northwest Women's Law Center)

Maine Coalition Against Sexual Assault (MECASA)

Maryland Coalition Against Sexual Assault (MCASA)

Michigan Coalition to End Domestic and Sexual Violence

Minnesota Coalition Against Sexual Assault (MNCASA)

National Alliance to End Sexual Violence (NAESV)

National Center for Victims of Crime (NCVC)

National Crime Victim Law Institute (NCVLI)

National Sexual Violence Resource Center (NSVRC)

New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)

New Jersey Coalition Against Sexual Assault (NJCASA)

New Mexico Coalition of Sexual Assault Programs, Inc.

New York State Coalition Against Sexual Violence (NYSCASA)

North Carolina Coalition Against Sexual Assault (NCCASA)

Oregon Attorney General's Sexual Assault Task Force (SATF)

Oregon Coalition Against Domestic and Sexual Violence (OCADSV)

Pathways for Change, Inc.

Pennsylvania Coalition Against Rape (PCAR)

Renee DeVesty, Founder & Executive Director of The Clean Slate Diaries

Sexual Violence Law Center (SVLC)

Solace Crisis Treatment Center

Surge Northwest

Texas Association Against Sexual Assault (TAASA)

The Voices and Faces Project

Vermont Network Against Domestic and Sexual Violence (VNADSV)

Victim Rights Law Center (VRLC)

Washington State Coalition of Sexual Assault Programs

West Virginia Foundation for Rape Information and Services (FRIS)

Wisconsin Coalition Against Sexual Assault, Inc. (WCASA)

Women's Law Project

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF EUGENE VOLOKH, RICHARD W. GARNETT, MICHAEL STOKES PAULSEN, TIMOTHY ZICK, WILLIAM E. LEE, ALAN K. CHEN, & RONALD J. KROTOSZYNSKI, JR. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law. He is the author of over 30 law review articles on the First Amendment, including—most relevant to this case—*Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005), reprinted in FIRST AMENDMENT LAW HANDBOOK 314 (Rodney A. Smolla ed. 2005-06). He is also the author of THE FIRST AMENDMENT AND RELATED STATUTES: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS (Foundation Press, 4th ed. 2011).

Richard W. Garnett is Professor of Law at the University of Notre Dame Law School. The courses he teaches include Constitutional Law and Freedom of Speech/First Amendment. His publications include THE FIRST AMENDMENT: A READER (3d ed.) (ed., with John H. Garvey & Frederick Schauer)

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have consented to the filing of this brief, and their written consents have been filed with the Court. No counsel for a party authored the brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

(forthcoming 2014), and FIRST AMENDMENT STORIES (ed., with Andrew Koppelman) (Foundation Press 2011).

Michael Stokes Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas Law School. The courses he teaches include Constitutional Law. He has published widely on constitutional theory and interpretation, including several publications on First Amendment issues.

Timothy Zick is Robert & Elizabeth Scott Research Professor at William & Mary Law School. He teaches Constitutional Law and the First Amendment, and has written extensively about public speech rights. His publications include SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (Cambridge University Press, 2008), *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581 (2006), and *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439 (2006).

William E. Lee is a Professor in the Grady College of Journalism and Mass Communication at the University of Georgia. He is the author of 25 law review articles on freedom of expression, including—most relevant to this case—*The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. Davis L. Rev. 387 (2002). Professor Lee is also a co-author of THE LAW OF PUBLIC COMMUNICATION, a widely-used textbook now in its ninth edition.

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of Denver Sturm College of Law, where he teaches both introductory and advanced constitutional law courses. He has published numerous articles on constitutional law and civil rights, including *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31 (2003). Prior to entering academia, he was a staff attorney with the Illinois affiliate of the American Civil Liberties Union, where he litigated cases concerning free speech. He continues to be active in pro bono First Amendment litigation.

Ronald J. Krotoszynski, Jr. is the John S. Stone Chair, Director of Faculty Research, & Professor of Law at University of Alabama School of Law. He is an expert on the First Amendment and the author of dozens of law review articles, including *The Return of Seditious Libel*, 55 UCLA L. Rev. 1239 (2008) (co-authored with Clint Carpenter). His books include RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (Yale University Press 2012); THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (NYU Press 2006 & 2009); and FIRST AMENDMENT CASES AND THEORY (Aspen 2d ed. 2013) (co-authored with Professors Steven Gey, Lyrissa Lidsky, and Christina Wells).

SUMMARY OF ARGUMENT

I. Even many steadfast supporters of abortion rights believed that the Court erroneously applied the First Amendment in *Hill v. Colorado*, 530 U.S. 703 (2000). As put bluntly by leading liberal scholar Professor Laurence Tribe, *Hill* was among the candidates for "most blatantly erroneous" decisions of the 1999 Term. Tribe added that the case was "slam-dunk simple" yet the Court got it "slam-dunk wrong."

Specifically, pro-choice and pro-life scholars alike agreed that the *Hill* majority wrongly deemed the Colorado statute "content-neutral." The ACLU, for instance, called the statute "fundamentally flawed," and urged the *Hill* Court to strike down the law because it "distinguishes among speakers based on what they are saying and not on what they are doing . . . [s]uch distinctions are plainly content-based and trigger strict scrutiny." Kathleen Sullivan and Erwin Chemerinsky also opposed the *Hill* majority's content-neutrality finding.

Further, pro-choice and pro-life scholars also disagreed with the *Hill* majority's willingness to protect a listeners' "interest" in being let alone above a speakers' freedom of speech on a public sidewalk. Dean Sullivan called this a "listener preclearance requirement." Scholars observed that the Court's treatment of privacy interests on a public sidewalk contradicted decades of First Amendment precedent. And they worried that the State's interest in protecting the unwilling listener could serve as a tool for government to infringe on the free speech of other disfavored groups.

II. The majority's unsound analysis in *Hill* set the stage for the even more restrictive Massachusetts law here. As scholars predicted, *Hill* sent a clear message that laws obviously targeting abortion clinic protests should be considered content-neutral and receive only friendly intermediate scrutiny in the courts. *Hill* also set the alarming precedent that protecting an "unwilling listener" on a public sidewalk was a powerful State interest worthy of balancing against the First Amendment. Those themes of *Hill* are dramatically on display here, in *McCullen*.

Finally, attempting to limit its holding, the *Hill* majority placed significant weight on three aspects of the Colorado statute it upheld: (1) that willing listeners could still be approached; (2) that the 8-foot bubble was very small; and (3) that the law only banned "approaching," so that demonstrators could always stand in place and offer leaflets or hold signs as people walked around them. The *Hill* Court's emphasis on those limiting factors, however, utterly failed to cabin the *Hill* decision. Not one of them is true of the Massachusetts law here—but the First Circuit, applying *Hill*, readily upheld it anyway.

ARGUMENT

I. EVEN STRONG SUPPORTERS OF ABORTION RIGHTS FAVORED FREE SPEECH IN *HILL v. COLORADO*.

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court voted 6 to 3 to uphold a speech restriction around abortion clinics. The Colorado statute applied within 100 feet of health care facilities, and outlawed "'knowingly approach[ing]' within 8 feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.'" *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1993)). The law effectively banned unconsented, up-close protesting and "sidewalk counseling" around abortion clinics.

Pro-life sidewalk counselors challenged the law under the First Amendment. Upholding the statute for a six-justice majority, Justice Stevens first determined that the law qualified as "content neutral," then that it was "narrowly tailored" to significant government interests, and lastly that it left open "ample alternative channels for communication." *Hill*, 530 U.S. at 725-26. Justices Kennedy, Scalia, and Thomas dissented. They disputed every step of the majority's analysis, but in particular its "content-neutrality" finding. *E.g.*, *id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based."). The *Hill* dissenters believed that the Court had bent the First Amendment badly out of shape.

Leading liberal scholars agreed. Just months after *Hill*, Professor Laurence Tribe opined that it was "right up there" among the "candidates for most blatantly erroneous" cases of the 1999 Term. Laurence Tribe, *quoted in Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001). Tribe added that the case was "slam-dunk simple" and the Court got it "slam-dunk wrong." *Id.* The ACLU (which had asked the Court to strike down the Colorado law), as well as Kathleen Sullivan and Erwin Chemerinsky, all also disapproved of the *Hill* majority's analysis.

Indeed, both pro-choice and pro-life scholars raised concerns about the Court bending the First Amendment to accommodate abortion rights. Professor Michael McConnell worried that "we're in very serious trouble" when "the Court lines up on free-speech cases according to whether they agree with the speakers or not." *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747 (2001). Professor William E. Lee agreed that "[r]egardless of one's stance on reproductive autonomy as a constitutional right and the power of government to punish private action that interferes with the exercise of constitutional rights, the *Hill* decision is problematic." William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002). By 2003, *Hill* had been "condemned by progressive and conservative legal scholars alike." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).

Two aspects of *Hill* drew particularly fierce criticism from a broad spectrum of critics. First, hardly anyone seemed to agree with the *Hill* majority that the Colorado statute was "content-neutral." After all, on its face the law required examining the *content* of the speech to determine whether a crime had been committed; moreover, by addressing advocacy around health care facilities, the law clearly targeted anti-abortion speech. Second, many critics rebuked the Court for accepting a "listener preclearance requirement," thereby elevating amorphous interests in being let alone or avoiding offense in a public place to a level where they could balance out the First Amendment right to free speech.

A. *Hill*'s content-neutrality holding disagreed with the ACLU and drew immediate criticism from leading liberal scholars.

The issue of content-neutrality loomed large in *Hill*. Finding the statute content-neutral led to weaker scrutiny and all but invited the Court to uphold the law. On the other hand, if the Court had found the statute *not* content-neutral, that would have led to frequently "fatal in fact" strict scrutiny. On *Hill*'s facts, scholars quickly recognized that finding the law content-neutral did not stand up to dispassionate analysis. Their criticisms took two main paths.

First, it was widely understood that the Colorado statute did in fact target anti-abortion speech. The ACLU, for one, had always recognized

this. Tellingly, although the ACLU staunchly favors abortion rights, it believed the Colorado statute was "fundamental[ly] flaw[ed]." Br. for ACLU as Amicus Curiae Supporting Petitioners, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1045141, at *1, *7. In particular, the ACLU repeatedly contended that the Colorado law was *not* content-neutral: "the floating buffer zone created by the new Colorado law cannot be described as content-neutral"; the statute "distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content-based and trigger strict scrutiny"; and it is "only by evaluating the content of the speech that a factfinder can determine [whether the law has been violated]." *Id.* at *7, *10. The ACLU's root position in *Hill* was that the Court should not "avoid the hard choices that the Constitution requires by mislabeling Colorado's statute as content-neutral." *Id.* at *13. Yet that is exactly what the *Hill* Court did.

Agreeing with the ACLU, Kathleen Sullivan, (at the time, the dean of Stanford Law School) described § 18-9-122(3) as "the Colorado legislature's effort to draw a facially neutral statute to achieve goals *clearly targeting particular content*." Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) (emphasis added). "After all," she added, "the motivation for this facially neutral law had to do with its effect in shielding patients (abortion patients) known to be the recipients of a particular kind of speech (anti-abortion speech)." *Id.* at 737-38 (parentheticals in original). Dean Sullivan also noted that the Court's "striking" acceptance of facial neutrality was

inconsistent with *Santa Fe Independent School District v. Doe*, where the Court—during the same 1999 Term—struck down a facially-neutral invitation to student speeches at football games under the Establishment Clause because "it was truly a thinly veiled effort to showcase student-led prayer." *Id.* at 737.

Other scholars offered more in-depth criticisms of the content-neutrality holding in *Hill*. One elaborated on Dean Sullivan's view, noting that "the legislature was indeed disfavoring a particular message." Timothy Zick, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 101 (University of Cambridge Press 2008). And others expanded on the inconsistency between abortion in *Hill* and the Court's approaches to other types of constitutional cases. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1262-63 (2008) (citing *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964)).

Still others examined in detail what had actually happened in the Colorado legislature when it passed the statute in 1993. They found "explicit evidence that many members of the legislature itself objected to the content of the protestors' speech. The legislature 'heard descriptions of demonstrations that were highly offensive in both their content and in their location . . . .' During debate, members of the legislature discussed the 'extremely offensive terms' used by anti-abortion demonstrators. Legislators listened to testimony about protestors 'flashing their bloody fetus signs,' and yelling 'you are killing your baby.'" Jamin B. Raskin & Clark L. LeBlanc,

Disfavored Speech About Favored Rights: Hill v. Colorado, *The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 215 (2001) (citations omitted). Indeed, "there is powerful evidence that the legislature's principal or only concern was anti-abortion protestors." Chen, 38 HARV. C.R.-C.L. L. REV. at 56; *id.* at 75 ("[A]lmost everyone in Colorado knew that the state adopted the bubble law solely to restrict anti-abortion protestors."). Even the majority opinion *itself* in *Hill* conceded that "the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics." 530 U.S. at 715. Dean Sullivan was right: the Colorado law "clearly target[ed] particular content." Sullivan, 28 PEPP. L. REV. at 737.

Finally, Professor Erwin Chemerinsky was "troubled by the rationale that was given" in *Hill*, particularly on the issue of content-neutrality.[2] Erwin Chemerinsky, *quoted in Colloquium*, 28 PEPP. L. REV. at 752. Chemerinsky observed that the Court had taken views of content-neutrality in *City of Renton v. Playtime Theatres* and *Erie v. Pap's A.M.* that were inconsistent with *Hill*, and he was "concerned" that "the Court tried to find a content-neutral regulation."[3] *Id.*

---

[2] Chemerinsky did not, however, disagree with the ultimate outcome in *Hill*; he believed that the Court should have recognized that the law was not content-neutral, but upheld it under *strict* scrutiny.

[3] Shortly after *Hill*, Chemerinsky published an article titled *Content Neutrality as a Central Problem of Freedom of Speech:*

B. *Hill*'s focus on protecting the unwilling listener was also widely doubted and criticized.

A second focus of criticism was that the *Hill* majority had embraced "avoiding offense to listeners" as a reason to squelch speech in a traditional public forum. This subverted normal First Amendment principles by elevating unwilling listeners' presumed "interest" in being let alone on a public sidewalk above speakers' freedom of speech. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 & n.127 (2005) (explaining that, with narrow exceptions that do not apply to an entire category of speech in a traditional public forum, the right to free speech must "generally include . . . the right to offend people through that content, since much speech that persuades some people also offends others"). Dean Sullivan called this a "listener preclearance requirement." Sullivan, 28 PEPP. L. REV. at 737.

Scholars considered this new balancing between listeners and speakers in a traditional

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Problems in the Supreme Court's Application, 74 S. CAL. L. REV. 49 (2000). In the article, Chemerinsky noted that one "major problem with the Court's application of the principle of content-neutrality has been its willingness to find clearly content-based laws to be content-neutral because they are motivated by a permissible content-neutral purpose." *Id.* at 59. Cf. *Hill*, 530 U.S. at 719-20 ("The Colorado statute passes [the content-neutrality] test for three independent reasons. . . Third, the State's interest in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.").

public forum both remarkable and unwelcome. Dean Sullivan, for instance, observed that *Hill* was "a holding inconsistent with the usual rule that, in the public forum . . . offended listeners must simply turn the other cheek." *Id.* Professor McConnell agreed: "*Hill v. Colorado* inverted ordinary free-speech principles" by restricting the speaker to protect unwilling listeners in a traditional public forum. McConnell, 28 PEPP. L. REV. at 748.

Others took an even stronger view. "[T]he Supreme Court's apparent recognition of a public 'right to be let alone' is in tension with literally decades of First Amendment jurisprudence. . . . [P]rior to *Hill* no such right or interest had ever been recognized." Zick, SPEECH OUT OF DOORS at 101; *see also* Lee, 35 U.C. DAVIS L. REV. at 426 ("In stark terms, the privacy interest in *Hill* contradicts more than half a century of First Amendment doctrine. Protection for the unwilling listener markedly alters the structure of dialogue on the public streets."). Looking to the future, scholars worried that "this novel 'interest'" in avoiding unwelcome speech had been accorded "sufficient weight to justify balancing it against the constitutional bedrock of free speech rights in the public forum." Raskin & LeBlanc, 51 AM. U. L. REV. at 199. "Consequently, the state's interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups." *Id.*

In sum, the *Hill* majority embraced at least two positions that were widely recognized as very strange—at best. First, it found that laws creating advocacy-free bubbles around health institutions were content-neutral, thus denying the obvious

targeting of pro-life speakers around abortion clinics. Second, it elevated the protection of unwilling listeners far beyond prior doctrine. Unfortunately, these ideas did not fade away after *Hill* or stay cabined in Colorado.

II. THE LOGIC OF *HILL* OPENED THE DOOR TO THE MORE RESTRICTIVE MASSACHUSETTS LAW HERE.

A. In the wake of *Hill*, scholars predicted trouble such as this ahead.

Even while *Hill* was pending at the Court, observers began to sense that it carried great risk to the First Amendment. In addition to the ACLU, the AFL-CIO filed a 21-page amicus brief defending the speech interest in *Hill*, to protect the speech rights of labor unions. Br. for AFL-CIO as Amici Curiae Supporting Petitioners, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1034471.

After *Hill*, predictions of trouble ahead intensified. One article opined that allowing speech restrictions to protect "unwilling listeners" could "be the basis for [future] laws restricting speech near other places, such as the sites of labor disputes." Lee, 35 U.C. DAVIS L. REV. at 390. Another article contended that *Hill* had created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places." Raskin & LeBlanc, 51 AM. U. L. REV. at 182.

Scholars recognized that several themes in *Hill* could cause future damage to the First Amendment. Most relevant to this case, the *Hill* majority's finding of content-neutrality instructed legislatures how to restrict speech, especially anti-abortion speakers around clinics. The message was that speech restrictions, at least if drawn to bar *all* speech and applied generally to medical facilities—would be considered content-neutral and receive only friendly intermediate scrutiny from the courts. *Hill* also essentially instructed that protecting people from hearing disagreeable words in a traditional public forum is a powerful State interest worthy of balancing against the freedom of speech. Given these instructions, outcomes like the one reached by the First Circuit in this case are no surprise.

B. The courts have slid directly down *Hill* to *McCullen*.

In upholding the Colorado statute, the *Hill* majority attempted to limit the scope of its holding by emphasizing certain unique aspects of the Colorado law. It failed. Thirteen years after *Hill*, and directly referring to it, the First Circuit has upheld here a Massachusetts law that even more clearly treads on the First Amendment.

The *Hill* majority pointed to several elements of the Colorado statute that it believed would limit its holding in that case. First, the *Hill* majority carefully and repeatedly stated that Colorado's statute "deal[t] only" with *unconsenting listeners*; that is, the statute and the question presented were about "protect[ing] listeners from unwanted

communication." 530 U.S. at 716. The majority urged that laws protecting unwilling listeners were "significant[ly] differen[t]" from those barring speech to a willing audience. *Id.* Indeed, Justice Stevens referred to "unwilling listeners" or "unwanted communication" at least 14 times in the majority opinion. *E.g.*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").[4]

Second, the *Hill* majority emphasized the small size of Colorado's 8-foot bubble zone. Beginning at the oral argument, the justices probed the 8-foot scope of the law.[5] The majority eventually concluded that the "8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators," *id.* at 726, and added that it still allowed communication "at a 'normal conversational distance.'" *Id.* at 726-27 (quoting *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S.

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[4] With respect to citizens' rights to "'reach the minds of willing listeners,'" the Court concluded that the "Colorado statute adequately protects those rights." 530 U.S. at 728.

[5] *See* Oral Arg., *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856), 2000 U.S. Trans. LEXIS 14, at *3 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *12 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully.").

357, 377 (1997)); *id.* at 729 ("Signs, pictures, and voice itself can cross an 8-foot gap with ease.").[6]

Third, the *Hill* majority relied on the fact that the Colorado law allowed demonstrators to stand in the path of oncoming pedestrians and offer their material, so long as they did not make additional physical "approaches" to people. "[T]he statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute." *Id.* at 727. The Court further observed that "[t]he statute does not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept." *Id.*

The *Hill* majority put significant weight on these three facts—that willing listeners could still be approached; that the 8-foot bubble was very small; and that the law only banned "approaching," so that demonstrators could always stand in place and offer leaflets or hold signs as people walked around them. *None of these things is true of the Massachusetts law here.* In fact, the Massachusetts law infringes on free speech substantially more than the Colorado law in *Hill*—but under *Hill*, it was upheld.

There is no question that this case is the progeny of *Hill*. The Massachusetts law here began as a no-approach statute modeled on Colorado's.

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[6] *See also Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*.") (emphasis added).

McCullen v. Coakley, 571 F.3d 167, 173 (1st Cir. 2009) (describing Massachusetts' bubble law passed in 2000 as "loosely patterned on the Colorado statute"). Concerns about "difficulties in enforcing the 2000 Act" and questions about its "efficacy" led to passage of the modern law in 2007. *Id.* The latest iteration of Massachusetts' bubble law establishes this rule: No one may enter or remain within 35 feet of a "reproductive health care facility" during business hours, with exceptions for people entering or leaving the facility, clinic employees acting in the scope of their employment, emergency or municipal workers, and people using the sidewalk "solely" to pass by on their way elsewhere. Mass. Gen. Laws ch. 266, § 120E 1/2(b) (2007) (described in 571 F.3d at 173-74). There are several obvious differences between this law and the Colorado law upheld in *Hill*.

First, the Massachusetts statute has no exception that would allow approaching a *willing* listener. The well-developed record in this case shows that before this law was enacted, many women accepted petitioners' conversational offers of help outside of abortion clinics. Yet the law here contains no consent provision that allows petitioners to enter or remain in an exclusion zone while communicating with a willing listener. Instead, petitioners must communicate from outside the painted boundary lines. That has had a profound effect on petitioners' speech. For example, "Plaintiff Zarrella—an 85-year-old grandmother who offers help on Saturdays and some Wednesdays—testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction with an incoming

woman since the Act took effect—after more than 100 successful interactions before the Act." Pet. Cert. at 14-15.

Second, the 8-foot "bubble" in *Hill* has inflated into a 35-foot exclusion zone here. It goes without saying that 35 feet is not "a normal conversational distance." 530 U.S. at 726-27. In *Hill*, the ACLU did not even approve of 8 feet—as its brief pointed out, "it is impossible to hand a leaflet to someone who is standing eight feet away." Br. for ACLU as Amicus Curiae, *Hill*, 520 U.S. 703 (No. 98-1856), at *21. But 35 feet obviously is more than four times worse. That distance squelches any opportunity for normal conversation and leaves petitioners here in an ugly world of shouts, bullhorns, and poster-size pictures.

Third, the 35-foot bubble zone here categorically excludes speech. Unlike the Colorado law in *Hill*, the statute here leaves no way for a stationary speaker to converse or offer leaflets anyplace within arm's reach of patients entering the clinics. The Massachusetts law makes it a crime even to remain stationary and hold out literature or offer help in a normal conversational tone on public sidewalks. This goes well beyond any reasonable "prophylactic" approach for a speech restriction; indeed, any concern about intimidation or obstruction could be satisfied by requiring speakers to remain stationary while speaking or handbilling, and by having a separate rule prohibiting physical obstruction. Indeed, exactly such a statute existed in Massachusetts well before it enacted the law challenged here. *See* Mass. Gen. Laws, ch. 266, § 120E (2007) (prohibiting obstruction of "entry to or departure from any medical facility").

In sum, the *Hill* majority accepted an 8-foot no-approach bubble with exceptions for stationary speakers and consenting listeners. Relying on *Hill*, the First Circuit here accepted an absolute 35-foot speech-free zone. *McCullen v. Coakley*, 708 F.3d 1, 7 (1st Cir. 2013) (referring to the Supreme Court's "well-settled abortion clinic/buffer zone jurisprudence").

In fact, reliance on *Hill* in this case began in the District Court, which found content neutrality by "relying mainly on *Hill*." *McCullen*, 571 F.3d at 176. The First Circuit itself agreed that the Massachusetts law was content neutral mostly by relying on its own 2001 and 2004 decisions upholding earlier versions of the statute—both of which heavily relied on *Hill*. *E.g.*, *id.* at 176-78; *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("We view [this] statute through the prism of *Hill* . . . . *Hill* controls."); *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004).

On the narrow-tailoring and overbreadth parts of its analysis, the First Circuit again followed *Hill*. *E.g.*, *McCullen*, 571 F.3d at 180 (citing *Hill* twice). Applying the same type of thinking as in *Hill*, the First Circuit observed that petitioners could stand and speak or offer leaflets outside the 35-foot zone, and from there they could still "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities." *Id.* Accordingly, the First Circuit "respected" the "legislature's judgment" and found the statute good enough to "surviv[e] intermediate scrutiny." *Id.* at 179, 181. On overbreadth, the First Circuit dismissed the

petitioners' argument as "eerily reminiscent of one considered and rejected in *Hill*." *Id.* at 181.

Hill is the seed from which this cursory analysis sprouted. The gist of *Hill*—that speech-restrictive bubbles around abortion clinics are content-neutral laws deserving only friendly intermediate scrutiny—is on full display in this case. Given that gist, it was only predictable that precise footage-calls, consenting-listener exceptions, and narrow approach-only limits that the Court discussed so much in *Hill* factored not at all in the First Circuit's decision in this case.

CONCLUSION

Amici respectfully request that this Court reverse the judgment of the First Circuit.

Respectfully submitted,

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